AN ANALYSIS

OF

CRIMINAL LIABILITY.

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BY

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INTRODUCTION.

THE general utility of that study, which it is my office to recommend, appears to lie less in the mastery of detail than in the grasp of certain pervading facts or principles. In other words, Roman Law is, to the majority of students, principally valuable from its connexion with Jurisprudence. On the latter subject we have, in England, an extremely original and powerful work, recognizing, on the one hand, (though not with sufficient clearness of reference,) the bearing, upon that subject, of Roman Law; criticizing, on the other, with perhaps more severity than justice, the contributions to the same subject by our own institutional writer, Blackstone. I need not say that I refer to Austin's Jurisprudence. The circumstances, under which his work has come to us, need but mention, to remove from those, who venture sometimes to criticize his dicta, the remotest suspicion of any disrespect to so great a name. For those circumstances fully explain that peculiar character of Austin's lectures which leads, in some cases, to a mode of studying them, useless if not prejudicial, and the last that their author would have wished. He himself was unfortunately obliged, after a very

short time, to relinquish the chair in which he did such devoted service—service, *now* fully appreciated, but too late. With disappointed hopes, and in broken health, he shrank from essaying anew work which he considered a failure, and in particular from preparing for publication the materials of his past lectures. Hence, in spite of the rare ability of his widow and editor, the works of Austin necessarily come to us in a brief incomplete form, and present an appearance of dogmatism very alien to the humility of the real genius that produced them. This *form* appears to have blinded many students of Austin, to the spirit. I find him 'got up' like an analysis, and with as little good to the getter up as ever accrues from any analysis: his somewhat abrupt dicta are alleged—almost (like Coke's reports) without citation of the name of their author—as final truth beyond the region of discussion: his terminology confronts us in capitals, like the laws of the Twelve Tables. Such a servile following would not have been by any means to the taste of this eminently fair-minded man, who above all things courted close examination. Least of all would he have tolerated an acquaintance with the once popular jurist, whom he subjected to such unsparing criticism, formed, as it now too often is, merely through the medium of that criticism itself. To counteract this one-sided study of English jurisprudence, I have made it part of my business to take every year some considerable portion of Austin's work, directing careful attention to the previous views which have occasioned his dicta, and investi-

gating the practical bearing of the latter upon the life and law of the present day. One of the most important parts of that work is what its author styled an Analysis of Pervading Notions, and, in this analysis, the greatest practical value, according to my view, belongs to the part which deals with the operation of sanctions—notably of criminal sanctions. As this part of Austin's subject is, moreover, easily separated from the rest, I have for some time given it a separate, and rather special, consideration. Such a consideration is also suggested and facilitated by the recent and most valuable contributions of Sir James Stephen to the scientific knowledge and the reform of our own criminal law. To the 'General View' the 'Digest' and the proposed 'Code,' of this author, I am, as will be seen, deeply and continually indebted. Towards the practical work of reform in which he and others are at present engaged, it would almost be impertinent in a student to offer his suggestions. For he can scarcely fail to intrude, into a consideration of the actual and possible, some *a priori* view or ideal which cannot be entertained by the working legal reformer. It has however been my continual endeavour to render my work as little speculative as possible, by confining myself within such opinions, aims, and sentiments as I take to be generally admitted: to make the jurist, in fact, what he should be, in such an eminently practical matter as criminal law, merely an exponent of the feelings of ordinary men. I have, therefore, tried to reduce enquiries, which might otherwise stray any lengths through the domain

of psychology and metaphysics, to such plain points and questions as would seem natural and fitting, to be put by a judge before a jury.

The principles and illustrations employed are mainly drawn from English Law; but I have not, of course, omitted anything which was to be found in the Corpus Juris, bearing upon my subject: and I am not without hope that I may subsequently enlarge this work by comparing some of the rules, of principle or practice, in bodies of modern continental law. Reserving, however, such a treatment of my subject for the future, I have at present purposely avoided the quotation of many parallels, which will probably occur to my readers, from the Code Napoléon or similar sources.

In point of *style*, I have to apologize for a use of the first person, which certainly does not indicate any egotistical value placed on the matter published, but is an almost unavoidable result of that matter having been originally cast in the form of *lectures*. For convenience of reference, I append a list of such of the works quoted as may vary in edition or mode of citation.

Austin's Jurisprudence. Third edition. 1869.

Bentham's Introduction to the Principles of Morals and Legislation. (Clarendon Press.) 1879.

Bentham's Theory of Legislation, translated from the French of Dumont by R. Hildreth. 1864.

Bentham's Works. (Bowring.) 1843.

Blackstone's Commentaries (Int. Introduction), with the original paging (printed in the margin of Chitty's edition).

Bracton. Paging of Tottell's edition. 1569.

Code. Criminal (indictable offences). Bill as amended in Committee. 1879.

Coke's Institutes. (1. Commentary on Littleton: 2. Exposition of Statutes: 3. Pleas of the crown: 4. Jurisdiction of Courts), with the chapters and the old paging.

Foster. Report and Discourses. 1762.

Hale. Pleas of the Crown. Chapters and old paging.

Hobbes. Leviathan. 1651.

Markby. Elements of Law, &c. Second edition. 1874.

Maudsley. Responsibility in Mental Disease. (International Scientific Series.) 1874.

Russell. On Crimes and Misdemeanours. Fifth Edition.

Skeat. Etymological Dictionary of the English language. (In course of publication.)

Stephen. (G. V.) A general view of the Criminal law of England, by James FitzJames Stephen. 1863.

Stephen. (Digest.) A Digest of the Criminal Law, by Sir James FitzJames Stephen. 1877. Also see Code.

Taylor. Manual of Medical Jurisprudence. Tenth edition. 1879.

Taylor (P. P.). Principles and Practice of Medical Jurisprudence. Second edition. 1873.

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AN ANALYSIS

OF

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CHAPTER I.

THE CHARACTER, END AND OPERATION OF CRIMINAL SANCTIONS.

It is not my intention here to enter upon a definition of Law, or a criticism of the well-known definition given by Austin[1]. Elsewhere I have endeavoured to shew that the sense, in which this and similar names are ordinarily employed, covers *every* rule of conduct, actually obtaining among a class of human beings, by sanctions of human displeasure. Since, however, my present subject merely extends to such laws as are administered, and such sanctions as are applied, by the *magistrates* of a state or political society, I may omit the cases which Austin's definition, improperly as it seems to me, excludes.

Magisterial sanctions may be distinguished among themselves by their character, the procedure or mode in which, and the end or purpose with which, they are applied.

[1] Lect. 6, p. 339. "Every positive law (or every law simply and strictly so-called) is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme" and *passim*.

In the present use of the word *sanction*, an *evil* contingent on non-compliance, rather than a *good* contingent on compliance, is almost universally intended[2]. It is not, at first sight, easy to point out what *is* the contingent evil in *all* sanctions, even of such as are magisterially applied. The difficulty, however, arises rather in the case of *civil* than *criminal* proceedings; and even in the most difficult case conceivable —that where no payment of *costs* should be inflicted—there is what Austin well terms the sanction of *nullity*[3]; in other words, the loss of time and trouble and the disappointment of expectation, to which the person violating the rule is liable. Another class of sanctions treated by Austin as somewhat abnormal—those which affect men through sympathy with others—Bentham's *vicarious* punishments[4]—or by the principle of *association* (as in the posthumous dishonour once inflicted upon suicides[5]), does not seem to present any real difficulty.

In all cases of **Crime**, the sanction consists of some *punishment*, i.e. some positive and distinct suffering or loss. But Crimes, or public wrongs, are best defined, *in genere*, by the *procedure* with which they are practically treated, and the *end* or *purpose* with which that procedure is employed. A definition by their intrinsically injurious *tendency*, alone, is not enough; though it is, beyond a doubt, the belief of a community, or its authorities, as to the degree and extent of that injurious tendency, which leads to the special treatment of certain conduct as criminal.

[2] See Blackstone, Int. § 2, p. 56; Austin, Lect. 1, p. 93. Bentham (Int. p. 24) on the other hand designates as sanctions "sources" both "of pain and pleasure."

[3] Austin, Lect. 27, p. 522.

[4] *ib.* p. 523. "These Mr Bentham has styled vicarious punishments." Bentham, Principles of Penal Law, 2. 4. 4. (Bowring, I. p. 479). See also Theory, p. 329 tr.

[5] *ib.* p. 523.

With regard to *procedure*, criminal sanctions are correctly said to be imposed (or, as I should say, applied) 'at the discretion and by the direction of those who represent the public,' whether private prosecutors, public prosecutors or common informers[6]. Hence crimes are not, like mere private wrongs, *remissible* by an individual wronged. Thus the sanction of *nullity*, where the intended act in law is void rather than voidable—a distinction pointed out by Austin[7]—has a semi-criminal, but only a semi-criminal character. It is not remissible by any individual: but neither can it, on the other hand, be said to be imposed at the discretion of those who represent the public: it simply attaches to the violator of the rule, on his attempt to avail himself of the right which, through such violation, he has not acquired.

As to the **end** or **purpose** of the two classes of sanctions, I have ventured to hold, somewhat in opposition to Austin's views[8], that *civil* procedure regards mainly the wrong done to an individual and the restitution or redress to be made to him; *criminal* procedure regards mainly the injurious consequences to the community, resulting from the conduct of an offender, endeavours to prevent a recurrence of such consequences by suffering imposed upon him, and enquires particularly into the circumstances of his conduct and consciousness. It is then, we may remark, evidently in the case of criminal or public wrongs, where the consciousness of the party is a chief point to be considered, that the operation of sanctions, in general, is most important and most clear. To return, however, to the *end* or *purpose* of criminal sanctions,

[6] Stephen, G. V. pp. 4, 5. I do not therefore draw the distinction of Sir James Stephen between *punishment* and *penalty*.

[7] Austin, Lect. 27, p. 522. I do not, however, understand the sentence beginning "Whether the transaction—." Application for rescission and plea of nullity do not appear to be *both* applicable to both voidable and void transactions, but the former to the former and the latter to the latter.

[8] Lecture 27.

I may here say a few words upon certain more questionable ends than that of *prevention* indicated above.

The word *poena* from which **punishment** is derived points, in its own ultimate derivation[9], to the idea of *purification*. Moreover, many old legal forms, histories, and legends shew that capital punishment was frequently regarded as the purification of a community, or the removal from it of the wrath of heaven, by sacrifice of the sinner. This end of criminal procedure is now obsolete.

Again, as opposed to the idea of attracting by a *remuneratory* character, magisterial sanctions in general, which operate, as we have seen, by a conditioned *evil*, are sometimes said to be *vindicatory*[10]. But a more special meaning is sometimes given to this word in the case of *criminal* sanctions in particular. In old works on law, written perhaps rather in the theological tone of mind, we shall hear of "*vindicating* the majesty" of the law; under which heading I may, for convenience, take *vindictive* satisfaction generally. If the phrase quoted merely means shewing that the sovereign will execute the law—that its menaces, as Austin says, are not idle or vain—it comes to little more than *deterrence from similar offences*, of which I shall speak shortly. If it expresses the satisfaction of a spirit of *resentment* felt by the community or by the sovereign as the representative of the community ("*the law*" of course having no feelings)—there is a certain independent meaning and truth in it. Even Blackstone[11] speaks of *satisfaction* to the *community* in the case of gross and atrocious injuries (*crimes*); though he apparently objects to the idea of vindictive satisfaction to the *individual*, arguing evidently from the text "Vengeance is mine," &c.[12]

Bentham seldom deals very directly with Blackstone, or no doubt he would have fallen foul of this passage—and

[9] Corssen, Beiträge, p. 78.

[10] Blackstone, Int. § 2, p. 56.

[11] Blackstone, Comm. 4. 1, p. 6.

[12] *ib.* p. 11.

Austin, though bitter enough against *natural* morality, is singularly cautious as to *revealed* religion. I find, accordingly, in Austin, nothing on this subject; in Bentham, no direct reference to Blackstone, but one of his general salutes to "common moralists" about the "spirit of vengeance[13]." Of this motive he shews, after his fashion, the "utility" both to the public and to the person injured.

Sir James Stephen[14], quoting, besides Bentham, the high authority of Butler, in favour of the passion of revenge[15], states that punishment regulates, sanctions and provides a legitimate satisfaction for that passion. Judging by his language and illustration, I think he confines this particular advantage to the satisfaction of the person injured.

I believe that the notion of an offender getting his *due*, being *served right* or *served out*, enters to a considerable extent into that feeling of a community which supports and enables the execution of penal sentences. I am not at all sure that, if we could analyse this sentiment to the bottom, we should not find its chief constituent to be a *fear* of suffering from similar acts, in which case we might class the feeling of resentment with the desire of prevention. This is clearly true of the wild justice which, in default of better, is occasionally administered by "vigilance" committees under the name of Lynch law. I need not, however, enter here into an analysis or justification of vengeance against the criminal, because, so far as relates to the consciousness of the *latter*, with which I am mainly concerned, precisely the same *knowledge* on his part is required, to account for any rational

[13] Theory. Principles of Penal Code, Pt. 2, ch. 16. 'Vindictive satisfaction.' Bowring, I. p. 382. In a note to the Introduction, ch. 13, p. 171, this satisfaction is treated as a collateral end of punishment.

[14] Stephen, G. V. 98, 99.

[15] Sermons 8 and 9. Does not Butler, rather, distinguish *resentment* from *revenge*, and condemn the latter?

exercise of such vengeance, which we shall see to be required in order that punishment may effect its other, the *deterrent* or *preventive*, end. Revenge upon one who did not and could not know that what he did would most likely cause a certain result, and that such result was ground for punishment, is the act of a crazy despot alone.

Among reasonable people, at the present day, the paramount end, in comparison with which all other ends may be disregarded, of criminal sanctions, punishments, or, as Bentham calls them, "penal remedies," is, as the same author tells us, "to prevent like offences[16]." As to the practical operation of such sanctions, the mode in which this "end or final cause of human punishment" is attained, I know no clearer or better statement than that given by Blackstone[17]. Of the "three ways" which he mentions, viz. (*a*) by amendment of the offender, (*b*) by deterrence of others from offending in a like way, (*c*) by depriving the offender of the power to do future mischief, I have first to remark for a moment upon the *third*.

As regards the *offender*, this case occurs when *his* chance of amendment is thought of no importance, compared with the deterrence of others like him, and the safety of the remainder. To *him*, it is a mere matter of physical compulsion for the future, whether by death or other permanent incapacitation, the time for the operation of a sanction proper[18] upon his knowledge and will having passed by. To others, such a punishment has the same deterrent effect as a minor punishment has, and as the prospect of the kind of punish-

[16] Theory. Principles of the Penal Code. Pt. 2, ch. 1, pp. 271, 2, tr. Bowring, I. 367.

[17] Blackstone, Comm. 4. 1, pp. 11, 12. The same 'ways' are stated by Bentham (Introduction, ch. XIII. note, pp. 170, 1) are *reformation*, *disablement*, and *example*.

[18] See Austin, Lect. 23, p. 468, for the distinction between physical compulsion and sanction.

ment now under consideration previously had, upon the offender himself. This last point is of importance as bearing upon the often misunderstood maxim "*ex post facto* punishment operates not as a warning." As against this maxim it has been argued, with regard to the practice, of course now obsolete, of criminal law made after the case, that, although the victim could not have known, and so *his* will could not have been affected, yet his punishment may deter others. Austin well points out a fallacy in the article (of the Edinburgh Review) in which this argument is pressed[19]; shewing that the legislation, if any, involved in such a case[20], is *not ex post facto* for *future* cases; that the meaning of the saying "*ex post facto* punishment operates not as a warning" is, that the *party punished* was not warned (or, as I should prefer to say, *aware of his danger*) before.

Apart from the gross injustice of such a proceeding towards the victim, a moment's consideration will shew why its exemplary or warning effect *upon others* will be of little value. Although the rest see that a man has been punished for a certain act, yet, *ex hypothesi*, they also see that he could not have known or surmised the act to be punishable. Thus, reasoning by analogy, they feel that though they may avoid *that* act they may be as liable for *any other;* which feeling would prevent their regulating their conduct by reference to public justice at all. For the due effect, then, of a punishment *upon others*, it must not be *ex post facto*, as regards the offender. I may here however quit the partial view of previous "warning" or knowledge into which I have been

[19] Austin, Lect. 25, p. 502.

[20] *ib.* 503. His contention that this particular instance (Lord Strafford's attainder) was not in any form a legislation for the future, because it was not a judicial decision, seems feeble. Judicial decisions do not declare in general terms "that those who might do thereafter as Strafford had done should be visited with Strafford's fate:" and why should not an act of attainder be the basis of others, as well as a judicial decision?

led by consideration of the peculiar case of *permanent* incapacitation for future mischief.

The general *preventive* end or purpose, common, in some degree, to *all* sanctions, but in the highest degree characteristic of *criminal* sanctions, is meant to be attained through the knowledge, and consequent desire, of men. The *knowledge* postulated may be broadly stated as: (1) knowledge that certain conduct on the part of the persons to be deterred is likely to lead to a certain result; and (2) knowledge that conduct leading to such a result is punishable. Without this, a sanction loses its effectuality or operative power[21]. A man cannot desire to avoid the specific conditioned evil unless he knows of its existence, or knows the law, and knows that his conduct will violate the law[22]. Where, as here, the sanction *does not operate*, Austin is logically right in saying[23] that these are less correctly styled cases of *exemption*, than cases to which the idea of original obligation does not apply. Legal obligation is not (at least under a *sane* government) liability to sanction, or evil conditioned on non-compliance, *absolutely:* but, liability to such evil, as held out to rational beings, upon whose motives it is capable of working. In the *practical* order of treatment, however, which looks first to the *mischief*, then traces it back to the *man;* the connexion being once established, the latter is *primâ facie* liable for the former: so that, when certain incapacities are proved, which negative that liability, the notion of *exemption*, or *taking out of the danger*, is that which naturally occurs to the mind.

[21] Austin, Lect. 25, p. 496. He only differs from my view in looking to the *original* act forbearance or omission as *forbidden* by law, rather than to the *consequences* of the same as declared to be ground for punishment.

[22] *ib.* Cf. too Lect. 26, p. 514. He "neither was nor could be conscious that he was violating his duty." See also Austin's "conditions of imputation." Lect. 20, note 84, p. 446.

[23] Austin, Lect. 26, p. 515.

In speaking, as I have now come to speak, upon the practical operation of sanctions to produce the paramount end of all human punishments, I may with advantage glance for a moment at the *actual form and working of law in general*, as distinguished from the distinct *command by the sovereign*, which is still rather theoretical than historical.

In theory[24] then, law expressly prohibits or commands, thus creating certain duties negative or positive. In practice the language of law, even as known to the lawyer, is very frequently no more than this—if a man, by his conduct bring about a certain result, he shall undergo some evil contingent on such conduct. That is, the language is very frequently not an express but an *implied* prohibition or command. Indeed, the first *laws* formally enacted are often merely regulations of punishment which has been in practice inflicted, by a varying custom, for violation of a customary rule never declared at all. Such direct commands as "thou shalt," and "thou shalt not," are sometimes matter of comparatively late codification.

But, it being supposed that the stage of direct commands or prohibitions has been reached, and those commands or prohibitions placed on permanent record, the language of Austinian theory must be, except for a very brief time and in a very small community, equally untrue. When we hear of the original sanction operating upon the desires of men and affecting their volitions: so that, by punishments inflicted, men are "reminded of the evil threatened by the law, and convinced that its menaces are not idle and vain[25]," we must see, if we think for a moment, that any *specific* knowledge of the *original sanction* will be possessed by few persons in a community, and those few from among the rich and well

[24] Austin, Lect. 1, pp. 94, 95. Lect. 5, p. 183 and *passim* (Ohe, jam satis!).

[25] Austin, Lect. 27, p. 520.

informed, not the needy and ignorant, who, by their circumstances, are *a priori* most likely to break the law. From what source, then, will the majority of the population get their practical knowledge, if they have any, of criminal law? I believe they have a good deal of such knowledge, and I believe, without any wish to be cynical, that they get it mainly from what they see and hear of criminal procedure and particularly criminal punishment. It is, therefore, of the first importance that such procedure and punishment be made generally known. Public trial and sentence does this to a great extent, where the courts are numerous and accessible, or reports cheap and widely disseminated. And on the old principle—*segnius irritant animos demissa per aurem, quam quae sunt oculis subjecta fidelibus*—I must admit that public *execution*, of such sentences as are capable of it, has still something in its favour[26], though nothing to what it had when it was the only practicable report to the public of criminal justice. The strongest objection to public execution is, to my mind, not so much the opportunity given by it for petty crimes (which is common to all assemblies of the needy and ignorant), as the very prejudicial kind of hero-worship which it fosters. This is true also of sensational printed reports about the demeanour of a criminal on trial, under sentence, or when undergoing any painful punishment: and the only correction which I can suggest, to these apparently necessary evils, is a brief official statement publicly posted up.

In speaking of the operation of punishment as what I believe it to be—the practical instructor of the great majority, as to the specific rules and sanctions of criminal law, I hope not to be understood as defending any principle of *ex post facto* punishment. A *general* knowledge, even of the most

[26] Bentham's requisite of 'exemplarity' clearly implies public execution of criminal sentences. Introduction, ch. xv. § ix. p. 193. See too Theory, Princ. P. C., Pt. 3, ch. 6, p. 337 tr.

ignorant majority, that certain conduct is *wrong*, and probably in some way punishable, before they receive more accurate information from sentences inflicted on themselves or others, is an essential to the justice of punishment, and is, as I shall shew more at length hereafter, true in point of fact. This, with the other necessary constituents of criminal liability, will constitute the subject of the next four chapters.

CHAPTER II.

ESSENTIALS OF CRIMINAL LIABILITY.

Injurious event and offender.

CRIMINAL procedure, as I have said, regards mainly the consequences resulting from the conduct of an offender, as injurious to the community; and endeavours to prevent such consequences from recurring, by suffering imposed upon him. The basis, therefore, of enquiry is the occurrence of a certain event and the referribility of that event to some human being. I am here deviating from the *order* generally observed by Austin in the excellent lectures forming the latter part of his Analysis of Pervading Notions[1]. *He* proceeds from the consciousness of the agent to the external results. In my point of view (which I have ventured to think the more practical one), we look first at the injurious events, with the prevention of which law is concerned, and then trace them back, if possible, to the conduct and consciousness of some individual responsible for them.

With regard to **'events'** generally, I gladly imitate the reserve, as to 'metaphysic,' which Austin inculcates but scarcely follows[2], and leave them rather indicated than defined. It is advisable, perhaps, as the same author observes[3], to avoid the ambiguous term *facts*, which might, from

[1] Austin, Lectt. 18—27. [2] *id.* Lect. 13, p. 369.
[3] *id.* Lect. 14, p. 376.

its derivation, be restricted to events immediately referrible to a human being, though it is generally used in a much wider and vaguer sense.

I must remark, however, that the *events*, of which I am now speaking, as forming the ground of criminal procedure, do *not* include a class of objects which Austin[4] *does* include under the name, namely, mere *internal* determinations of the will or affections of the mind. *Our* events, whether we choose to define them as *transient arrangements of permanent sensible objects*[5], or to leave them undefined, are all *sensible* or *external* matters—such as the burning of a house, the killing of a man, the removal of silver spoons to a servant's room. These may or may not[6] have to do with human agency, but of course only concern us if they *have*. It follows that, in legal definitions of such events as do ground criminal procedure, the event is generally connected expressly with human agency. But the question of connexion must sometimes be independently considered, where it is doubtful or remote[7]. *What* events, if referrible to human agency, ground criminal procedure, is a matter which depends, of course, upon the law of each particular community. To meet the infinite variety of cases which may arise, there is usually some rule or definition expressed in very general terms[8]; and it appears to be the reasonable doctrine of English Law[9] that, in the case of acts deemed expressly injurious to the public, analogy jus-

[4] *id.* Lect. 14, p. 375.

[5] A slight modification of Austin, Lect. 13, pp. 368, 9.

[6] *e.g.* in the case of lightning, an avalanche, the magpie of the story.

[7] *e. g.* Stephen, Digest, Art. 219, and see below.

[8] Stephen (Digest, Art. 176) defines a common nuisance as 'an act not warranted by law, or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience to the public in the exercise of rights common to all Her Majesty's subjects.'

[9] See Stephen's very important article and note, Digest, No. 160. Also his Introduction, p. xxxiv.

tifies the operation of courts upon cases *similar* to those which have been previously provided for or decided upon.

Justification and excuse. There is an important exception in the case of certain events *primâ facie* criminal, as injurious to the community, and clearly referrible to the conduct of a human being. Such a person may be *justified* or at least *protected* from *criminal responsibility*, in respect of the consequences of conduct which would otherwise be criminal, under circumstances recognized by the particular system of municipal law. The proper place for this subject, in an enquiry like the present, is by no means easy to fix. The circumstances in question sometimes embrace matters relating to the *consciousness* of the person (knowledge that his conduct was *wrong* or otherwise), a subject which naturally comes later on. But, on the whole, as the conduct under these circumstances is not criminal at all, and the circumstances are *mostly* of an *external* character, justification and excuse should rightly be mentioned here. This subject should, apparently, come in the *preliminary* matter at the beginning of a criminal code, although, as it relates mainly to force affecting the person, it might perhaps be connected specially with that department. For the main heads of justification and excuse, in English Law, I would refer to the passages quoted in the note[10].

There is again another exceptional class of events, *ex vi termini* referrible to a human being, and which *do* ground criminal proceedings although not *directly* injurious either to any individual or the community, but only so in their *ten-*

[10] Stephen, Digest, Pt. v. ch. 21, Artt. 196—210. 'Cases in which the infliction of bodily injury is not criminal,' classed under 'offences against the *person*, &c.' Code, §§ 25—70, contains similar provisions, classed with what I should call grounds of exemption (20—24), as 'justification and excuse for acts which would otherwise be offences,' among the 'Introductory Provisions.'

dency. I refer to such **attempts**, or inchoate acts, as are criminally prosecuted. Here Austin[11] holds that the offender is punished in respect of his *intention*, i.e. a particular state of mind, which is *evidenced* by some *overt*, i.e. external, act or acts.

It does not seem to me a matter of great importance whether we here, with Mr Campbell[12], *call* the intention an act, or confine that term, as Austin on the whole prefers[13], to *external* events. As a matter of fact, in all punishable attempts the *overt* act is now[14] so invariably essential, that it seems practically unobjectionable to regard the punishable matter rather as that overt act, when connected with the agent's state of mind, than as the state of mind when proved by the overt act. And, if we examine the extreme doctrine of *pure intention* which appears in the "imagining" or "compassing" of our own law of treason[15], we shall see that, except in cases of admitted gross injustice and tyranny, such as the monstrous judgment related by Hale as delivered under Edward IV., and the later trials of Peachum and Sydney[16], the *overt act* required by statute[17] has usually been not merely matter evidencing intention, but a step, however slight,

[11] Austin, Lect. 21, pp. 454, 5: 27, p. 523.

[12] Notes to Austin, pp. 427, 455.

[13] Cf. Austin, Lect. 14, p. 376, and Lect. 19, p. 433.

[14] Austin I think admits this in the text, Lect. 21, 455. I do not know the case referred to in the note (88), of a man punished for confessed intention (without overt act) to kill Henry III. of France.

[15] Where Foster (Discourse 1, pp. 194, 5), with a truer insight than Blackstone shews (Comm. 4. 6. 78, 79), speaks of the overt act as "the *means made use of* to effectuate the intentions of the heart,"—"The law," he says, "considereth the wicked imaginations of the heart in the same degree of guilt as if carried into actual execution, *from the moment measures* appear to have been taken to render them effectual."

[16] See Blackstone on these cases. Comm. 4. 6, p. 81.

[17] 25 Edw. III. stat. 5, ch. 2.

towards performance[18]. The relative importauce as between the constituents of an attempt is correctly given by Sir James Stephen, when he defines an attempt as an act done with intent to commit a crime and forming part of a series of acts which would constitute its actual commission if not interrupted[19]. The point at which such a series begins must naturally vary with different cases[20]; but, until the point is reached, law takes no account whatever of the preceding intention.

Incitement and **conspiracy** to commit a crime are clearly to be classed with attempts strictly so called[21].

I pass now, however, to events which, unlike attempts, are actually and directly injurious. Whether such events are legally *imputable* to a person depends upon their connexion with his conduct, and his state of mind with reference to that conduct. There are then, in crime, first of all two things to be established. 1. An event—perhaps only one in a series of connected events—which will ground criminal procedure, i.e. procedure at the discretion and in the interest of the public, provided it be a consequence of human conduct. 2. A connexion between that event and the conduct of some human being.

Consequences may be either ultimate or mediate, but must be, *in some appreciable degree*, connected with that to

[18] Such as *publication* of a treasonable document. Blackstone l. c. Coke admits mere setting down in writing. 3 Instt. 1, p. 5 (*fait compasser*) and p. 14 (*per overt fait*). See too Hale, 1 P. C. 115.

[19] Stephen, Digest, Art. 49. See note iv. p. 337. Code, § 74. For treason, he admits *writing* to be a sufficient overt act in the existing law (Digest, Art. 57), but does not insert a corresponding provision in the Code.

[20] *ib.*

[21] As by Stephen in Digest, ch. 5, "Degrees in the commission of Crime." Incitement (Art. 47), Conspiracy (Art. 48), Attempts (Artt. 49, 50). In the Code, as a matter of arrangement, might not the majority of the clauses in Pt. 36 go together with Pt. 4?

which they are referred. In stating this, or in saying that the connexion with the conduct of the party must *not be too remote*, I am laying down a condition which the least reflection will shew to be just, but which cannot possibly be reduced to rule. Innumerable cases may be imagined, ranging from the clearest non-responsibility to the clearest responsibility, accordingly as the connexion of the actual result with the conduct of the party is or is not sufficiently near[22]. It is a question of *degree*, dependent upon the circumstances of each particular case[23]; and is much the same question as decides whether certain conduct amounts or not to an attempt. Generally, we should say that an actual event was the consequence of a person's conduct, or that his conduct was an attempt to produce an event (which did not actually happen), when the event was one which most people would consider likely to follow from the conduct. Should this homely criterion be followed, the question would seem to me, in English law, one for a *jury*. Sir James Stephen, however, if I understand him rightly[24], would leave it to the judge "whether an act done or omitted with intent to commit an offence is, or is not, only preparation for the commission of that offence, and too remote to constitute an attempt to commit it."

Terms employed. A connexion, not too remote, being established, between the conduct of some person, and an

[22] Instances of over-remoteness occur frequently in Russell, on Manslaughter (Crimes and Misdemeanours, 1. 810—842). For instance. Evidence was too slight to convict for manslaughter, where the prisoner had struck a light and lighted a candle, contrary to ship's regulations, and thrown down the lighted match, but six hours elapsed without sign of fire by sight or smell. p. 841.

[23] Stephen, Digest, Art. 219, on the question "whether a given act or omission is directly and immediately connected with the death of any person." But the notes and illustrations (pp. 138, 9) have a clear bearing on 'causal connexion' generally.

[24] Code, § 74. The question, &c. (as in text) is a question of *law*.

event which, if the consequence of such conduct is, in the particular system of law, a ground for criminal procedure[25]; he is *primâ facie* **liable**[26], and the consequence and his conduct together constitute his **offence** or **crime**[27]. Where that *primâ facie* liability is removed, it is sometimes laid down[28] that the act was not a crime, sometimes[29] that there shall be no *conviction* for it. Where that liability is not removed, the consequence and conduct together are properly said to be **imputable** to the person[30]. Imputability is sometimes, but incorrectly, predicated of the wrong doer himself[31]; who is properly said to be, as above, **liable**, or **guilty**. This last word, which apparently first expressed liability to money payment[32], is now, beside the meaning of general criminal liability, sometimes used to describe the state of a person's mind considered as the cause of certain criminal conduct. Hence Austin's statement that **guilt** sometimes *de*notes the state of mind and only *con*notes the positive or negative consequences of that state[33], like *culpa*, when used by the Roman lawyers in a stricter sense, like the *reatus* of modern philoso-

[25] These words exclude cases of justification and excuse.

[26] *Ligabilis*. In this word, the introduction of which into our language is not very easy to trace, the *ligamen* is generally taken to be metaphorical = *obligation*. Is it impossible that *liable* may have originally meant subject to *physical bonds*? But see Skeat *sub voce*.

[27] For the distinction of *civil* or *criminal* sanctions see above. *Crime*, the substantive, is scarcely used in the wide sense tallying with that distinction: but either means *indictable offences* as distinguished from those punishable on summary conviction (Stephen, Digest, Int. VIII.), or (popularly) the more serious indictable offences. *Offence* is the more general term, and I have hereafter called the person inculpated the *offender*.

[28] Stephen, Digest, Artt. 25, 26, 27.

[29] Proposed in Code. See §§ 20—22.

[30] A metaphor from accounts. *Putare* to *clear*, i.e. *balance*; *in*, *against* a person.

[31] Austin, Lect. 24, p. 473, and note 95.

[32] Skeat *sub voce*.

[33] Austin, Lect. 24, p. 476.

phical jurisprudence, and like the *verschulden* of German law[34]. I mention these refinements merely to prevent misapprehension. *Reatus* and *verschulden* I willingly leave to Austin's explanation: but *culpa* is here, it must be remarked, used in an *intermediate* sense between that which is almost exactly equivalent to the ordinary meaning of *guilt*[35] and the still narrower one in which it is opposed to *dolus* or wrongful intention[36].

In its ordinary sense, **guilt**, I think, denotes *both* the state of mind and the consequences of that state of mind[37]: it differs from **crime**, in that *guilt* has reference primarily to the conduct and consciousness of the offender, while *crime* has reference primarily to the consequences of such conduct.

Presumptions. This is perhaps the best place for considering another technical phrase, which I have hitherto endeavoured to avoid. **Legal Presumption** is a matter of *evidence* or rather of dispensing with evidence. On the *term*, Austin has one of his somewhat quibbling objections[38]. It is absurd, he says, to style conclusive inferences presumptions. That is, where it is not allowable that any evidence to the contrary shall be admitted, there is nothing for the assumption to *pre*cede. Strictly speaking, a presumption is only an inference which is *not* conclusive, i.e. which may be disproved by proofs, to the contrary, following it. Practically, as every one knows, the term *is* applied to inferences which are legally conclusive, no such proof being admitted.

The same author also somewhat unnecessarily introduces the subject of *præsumptio hominis*. Whether this means an

[34] *ib.* pp. 477, 8.

[35] *ib.* p. 478. Cf. Lect. 20, p. 445. Generatim culpa dicitur quaevis injuria ita admissa ut jure imputari possit ejus auctori. I do not know the source of this quotation.

[36] *ib.* p. 445.

[37] So Austin, ultimately. Lect. 24, p. 478.

[38] Austin, Lect. 26, p. 507.

inference as alleged by the suitor or as left to the judge[39], it does not concern us, who have only to deal with præsumptiones *juris*, inferences which the law instructs the judge to draw from certain facts[40]. For instance, if a man acts in a way which would naturally, i.e. ordinarily, lead to certain consequences, the law *presumes*, or directs the judge to infer, that he *intended* those consequences.

In a simple *præsumptio juris*, as in the case just instanced, proof to the contrary is admissible, but, until such proof is produced, the inference holds[41]. Where the presumption is also *de jure* (which additional phrase apparently means *by intrinsic right*[42]), the admission of counter evidence is forbidden, or the inference is conclusive[43]. An instance adduced by Austin is the incapacity for unlawful intention or culpable inadvertence, of an infant under seven[44].

In most of the cases of presumed capacity or incapacity the inference is a true one, and the presumption reasonable. It is, I think, rather in defective *property* law, that legal presumptions obviously fictitious are made, as a means, Austin points out[45], of *indirect legislation*. With these last-named presumptions we are not here concerned.

[39] The latter is Austin's view, p. 507: the former seems to me the more natural meaning.

[40] Austin, *ib.*

[41] Austin, p. 508.

[42] Compare, at any rate, the antithesis, elsewhere, of *de jure* and *de facto*.

[43] Austin, *ib.*

[44] Austin, *ib.* p. 509.

[45] e.g. grant of easement. Austin, *ib.*

CHAPTER III.

ESSENTIALS OF CRIMINAL LIABILITY, CONTINUED.

Volition of the offender.

FOLLOWING what seems the more practical order of things —from the injurious event to the consciousness of the person responsible for it—we have arrived at the fact, now supposed to be established, that such event is connected, not too remotely, with the conduct of some person; is, *primâ facie*, his *offence* or *crime*. That person I shall henceforth, for convenience, call the *offender*, and shall proceed to analyse his conduct, or enquire of what facts it consists. An obvious primary division of these facts must be that he has either done something or *not* done something; his conduct may have been, on the one hand, an act; on the other, a forbearance or omission; of which cases I shall take the *act* first.

Acts. By *something* I here mean, as was stated in the case of *events* generally, above, something *sensible*, *external*, or, according to technical legal phraseology, *overt*. I do *not* include what is sometimes termed an *act of the will*, i.e. a state of things within a man's breast, which we have to infer or presume. It is as well, in fact, for the purposes of the present enquiry, to discard altogether the expression *acts of the will* and Bentham's *internal acts*[1], which Austin

[1] Bentham, Introduction, ch. VII. § xi. p. 73.

originally accepts but ultimately abandons[2]. The simple word *act* is the most convenient to employ for the something which has been done, being used in its ordinary and popular meaning.

First, then, we shall, as has been intimated, exclude from such meaning Bentham's *internal acts* and Austin's *determinations of the will* altogether. Consequently, we take the act *primâ facie* as an *external* state of things produced by the agent, or, if you will, by his body, whether voluntarily or involuntarily. *Voluntariness* is, by Austin and by many other authorities, who I think here step beyond the ordinary sense of the word, included in the definition of *acts* or *actions* themselves. "External acts are such movements of the body as are consequent upon determinations of the *will*[3]." "Acts" are "in strictness," "those bodily movements which immediately follow *volition*[4]." "An action is a set of bodily *voluntary* movements combined by the mind in reference to a common object[5]." And Austin's instance—falling into water—in favour of at once discarding certain bodily movements as not acts at all[6], is strong. Still, cases may occur and have occurred, where the line between the clear 'he could not help it' and 'he did not choose to help it' is very difficult to draw. The attached servant of a prince, accompanying his master in a tour through the Alps, in an epileptic fit throws out his arm and pushes that master over a precipice. Here only the most barbarous government would punish the man for what is doubtless in strictness, as Austin holds, not an act at all. But in such a case as that of Dove[7], whom most men consider to have been justly hanged, one line of defence was practically, that he *could not help* the *act* of

[2] Austin, Lect. 14, p. 376, and Lect. 19, p. 433. See Campbell's notes.
[3] Austin, *ib.* p. 376.
[4] Markby, § 208, p. 102.
[5] Stephen, G. V. p. 75.
[6] Austin, *ib.* p. 376.
[7] Stephen, G. V. p. 401.

poisoning. Other similar cases may be conceived, and have occurred.

We shall do well therefore, at first, to keep apart from our consideration even that amount of mental state which determines the voluntariness of the *mere bodily movement*, viewing the state of things simply *ab extra*, which I believe is the view taken by most ordinary people when they speak of an *act*.

In this point of view then, first of all, we leave out of Austin's definition of acts[8] the internal 'desires of them.' But it must be remarked, in the second place, that, if the popular use of the word *acts* leaves out part of Austin's definition, it also takes in something which he does not include. Speaking of that popular use, he remarks[9], with a practical good sense which underlies all his apparent dogmatism, that we cannot *discard* established forms of speech, and so, in this case, we must either substitute new expressions for ordinary language or include under 'acts' some of the more immediate and obvious consequences of them. In ordinary language, for instance, no line would be drawn between my grasping a rapier, extending my arm, and the rapier entering your breast; between my taking up a gun, pulling the trigger, and by that means igniting the charge and lodging the bullet in you. Consequences very *near*, and what would be considered, in the judgment of all ordinary men, very *certain*, are taken as "parts of the act;" more correctly speaking, as inseparably connected with the first bodily movement[10].

To digress for one moment into consideration of the

[8] Austin, Lect. 19, p. 432. "The bodily movements which immediately follow our desires of them."

[9] *ib.* and 433.

[10] Markby, p. 102, § 208, goes much further—"any one of a series of events which are regarded as the result of our bodily movements is called an act," &c.

agent's *consciousness*, I may remark that the assumption practically made by this popular inclusion, under a man's *act*, of those *immediate consequences*, which are sometimes said to be *willed*[11], becomes an important *presumption* of *law* in its application to those remoter consequences which are only said to be *intended*.

What would be the enquiry of any ordinary people into my *state of mind* with regard to the injury done you in the cases above supposed? With regard to the second, there would be a question as to my knowledge that the gun was loaded: but, in the first and clearer case, scarcely any one would either, to repeat the expression used above, draw any line, between my will to grasp the rapier and the rapier entering your breast, or question my wish to stab you. That is—where consequences are so closely connected with the first bodily movement of the agent, that they would generally be classed with it as his 'act,' the principle seems admitted by the ordinary use of words, that a man is, for criminal purposes, assumed to know, what ordinary people know is likely to result from his bodily movements, and to wish that result to happen.

Of course, the whole consideration of these consequences inseparably connected with bodily movement, has no place where there is no bodily movement, i.e. in forbearances and omissions. This digression has been on what is popularly understood by *acts;* and *there*, there are no acts in the popular sense.

Voluntary. Will. Volition. Acts, then, are, I believe, in the ordinary popular sense of the word, movements of the body coupled with the more immediate consequences of those movements. Upon the question whether the acts are **voluntary** or **involuntary** depends in the first instance, with all civilized legal systems, the question whether the conse-

[11] Austin, Lect. 19, p. 432.

quences of these bodily movements are imputable or not to the persons whose bodies have moved.

Blackstone, in a well-known chapter[12], attributes all exemption from criminal liability to deficiency of **will** or **the will,** under which general term he certainly includes very heterogeneous mental conditions, and is taken to task by Austin with due severity[13]. It seems better, on the whole, to recognize *more than one* genus of mental conditions which constitute such exemption, or more than one essential to criminality in the agent's consciousness, and to confine the word *will* to the question of *voluntary* or *involuntary* conduct.

It is important to remember at the outset in the use of this word *voluntary,* that the **volitions** intended are merely choices or preferences[14], but do not involve any *liking* for what we do. *Voluntary* has here, therefore, nothing to do with the *ultimate motives* determining the desire to perform the bodily movement[15]; merely with the fact that there *is* that desire or *volition.*

Volition is, says Locke, an act of the mind knowingly exerting that dominion it takes itself to have over any part of the man, by employing it in, or withholding it from, any particular action[16]. So Austin defines the individual *volitions,* which are essential to voluntary actions, as desires of a special kind[17]; such as are immediately (i.e. without inter-

[12] Comm. IV. ch. 2. Persons capable of crimes.

[13] Austin, Lect. 26, p. 511.

[14] See Locke, Essay, Bk. 2, ch. 21, §§ 15, 30. He is much more clear throughout this chapter than Austin (p. 429) gives him credit for being.

[15] Austin, Lect. 18, p. 430, quoting Bentham, Introduction, ch. VIII. note 1, p. 82.

[16] Essay, Bk. 2, ch. 21, § 15, 'any part of the man' is possibly objected to by Austin, where he speaks (p. 423) of *certain* parts of the body, not others (p. 426), nor the mind (pp. 426 and 469).

[17] Austin, Lect. 18, p. 422: Lect. 23 (*ad init.*), p. 467.

vention of means) followed by their objects, those objects being bodily movements[18].

These individual volitions Austin refuses to refer to any supposed *power* or *faculty*, called The Will, behind them[19], and inveighs, with his usual acrimony where popular morality is concerned, against the supposition that The Will can control the desires[20]. The Will has been, with other 'powers,' 'expelled from the region of entities' by Brown in his "Analysis of Cause and Effect[21]." To many minds the conception of the last named relation will still be something more than one of mere habitual or unconditional sequence: many moral natures will still recognize a conscious supremacy of some of their internal feelings (to use the most general term possible) over others: with neither of these controversies am I concerned. But I do not think Austin is exactly correct in his view of what people generally mean by The Will, and I am convinced of the practical convenience of *some* abstract term to express what they do mean. What is styled The Will is *not* a fancied something which comes between the wish and the bodily movement[22]. That would be, no doubt, a pure invention, like the old 'occult qualities' in inanimate matter, or Austin's own 'intention in acts,' i.e. expectation that bodily movement will follow the particular volition of which it is the immediate result[23]. What *is* meant by the emphasis of a definite article in *The Will*, or by the use of *volition* as an abstract term, is a distinction between the resultant or balance of many different desires which ultimately determines our conduct in an individual instance[24],

[18] *ib.* pp. 425, 426.
[19] Austin, Lect. 18, p. 424.
[20] *id.* Lect. 22, p. 462.
[21] *id.* Lect. 18, p. 425.
[22] *id.* Lect. 19, p. 431.
[23] *ib.* 434. See below, ch. VI. 'Intention.'
[24] Hobbes' 'last appetite or aversion.' Leviathan, c. 6, p. 28.

and the power of drawing that balance or judging between those desires[25]. In the presumptions and counter proofs of legal practice, particularly, as we shall see, in the case of *omission*, the **faculty** or **power** of **willing** must be recognized as something distinct from its *exercise*, and it is to that faculty or power that I should venture to give the name of **volition,** meaning volition in the abstract.

On his individual volitions Austin has a great deal of what appears to be rather psychological than legal reasoning. Law scarcely enters into them, any more than it does into the conditions of brain, which cause them, or the external impressions which may cause *that*. Being internal, and not perceptible by sense, the desires in question have to be inferred, and, as a matter of fact, they *are conclusively* inferred, except in certain recognized cases, in which an inference, or the admission of proof, to the contrary, is clearly reasonable.

An agent is *presumed* to *will* what he does, or, his *action* is *presumed* to be *voluntary*, unless he be in one of the predicaments hereafter considered; which may be roughly classed under the two heads of **Unconsciousness** or **Constraint**; suggested by the two homely questions:—(A) **Did he know what he was doing?** (B) **Could he help it?**

A. **Unconsciousness.** There is an **actual unconsciousness,** or what generally goes by that name[26], in **sleep,** and those cases of **mental derangement** where the person may be said, probably as to the primary motion itself, certainly, as to the most immediate consequences of that motion, *not to know what he is doing*, and therefore, of course, not to do it in consequence of a *wish* or *voluntarily*. With sleep

[25] See Locke, Essay, Bk. 2, ch. 21, § 5. Hobbes too (l. c.) admits a *faculty* of willing, although it is to the *exercise* of the faculty rather than the faculty itself that he gives the name of The Will.

[26] See for objections to the term, Maudsley, p. 239.

must obviously be ranked that condition intermediate between sleeping and waking in which the ideas and hallucinations of a dream persist for a time, and in which actions have been committed of the nature of which their agents are on all hands considered unconscious[27]. Sir J. Stephen apparently gives the name of *voluntary* to the actions of *somnambulists*[28]: but he would not, it is presumed, hold that such persons know what they are doing, or are responsible for it. It is quite possible that acts of a highly criminal character *per se* might be committed in this state of the agent, which is by some thought akin to epilepsy; the practical danger to be guarded against is the ease with which it may be feigned[29].

In the case of **lunatics** generally (as well as **infants**) the ground of exemption is based by Austin upon presumed absence of unlawful intention or inadvertence[30], and he takes Blackstone to task for saying that *the act goes not with their will*, &c[31]. If there is a positive act there *must*, he says, be a will going with the act. This follows from Austin's narrowing down the popular meaning (above, p. 22) of *act*, by insisting upon *voluntariness*. The injurious movement of the madman is not his act at all, in Austin's strict sense, if he does not know what he is doing. If he does, and is yet held exempt, the exemption has of course, nothing to do with *will*. But where there is a present mental derangement, which prevents the agent from knowing what he is doing, Blackstone seems to be more correct than Austin, in attributing a deficiency of *will*, though he is wrong in taking such deficiency to be the ground of *all* exemptions on the score of lunacy. His words, *defective* or *vitiated* understanding, do not, as I once thought they did, point to any alternative of moral discernment, but merely to the difference as generally conceived between an

[27] *ib.* 251—3. See however R. v. Milligan, Taylor, 763. [28] G. V. p. 79.
[29] Maudsley, 250, 251. [30] Austin, Lect. 26, p. 507.
[31] Austin, *ib.* p. 511. Bl. Comm. 4. 2, p. 24.

idiot and a *lunatic:* which is rather a medical than a legal distinction[32]; the enquiry for law being merely, so far as we have got, *Did the offender know what he was doing?*

Drunkenness. In the cases hitherto mentioned, then, the ordinary inference or presumption, that a person willed to do what he did, is allowed to be met by proof of his being in such a state of *unconsciousness* at the time, that he *could* not *know* what he did. To this head of not knowing what one is doing, and consequent want of volition, belong, in fact, extreme cases of **mad drunkenness.** Not where the man has intentionally drunk, as it is said, *to get pluck*[33], but where he does an act which he apparently neither intends nor wills nor likes, in an utterly aimless random fury. Blackstone[34] justly adverts to the parallel between this state and *frenzy* or fit of madness: and this, I think, rather shews that his reasoning is confined to, or at least suggested by, violent crimes. He is usually, however, taken to speak *generally*, and Austin says that in criminal cases drunkenness is, by English law, *never* an exemption. This statement will be examined directly. Another, made by the same author[35] as to the sweeping exemption allowed, in Roman law, to drunkards, is most questionable. Beyond a distinction between sudden and deliberate impulse in the punishment of battery or homicide[36], and a commutation of the penalty of death in the case of soldiers[37], I can find no authority for it.

[32] See Stephen's Digest, note 1, p. 332. For the distinction as drawn by Coke see 1 Inst. 247 a.

[33] Austin, Lect. 26, p. 512.

[34] Comm. 4. 2. 25, 26.

[35] *ib.* p. 512.

[36] Dig. 49. 19 (De poenis), 11. 2. Delinquitur...aut proposito aut impetu aut casu...impetu...cum per ebrietatem ad manus aut ad ferrum venitur. Was Austin's '*Even in delict*' due to the word '*delinquitur?*'

[37] Dig. 49. 16. 6, 7. Arrius Menander de re militari. Per vinum aut lasciviam lapsis capitalis poena remittenda est, militiae mutatio irroganda.

In the case of drinking "to get pluck" which Austin terms *intentional drunkenness*[38], as in many other crimes committed by drunken men, they *do* know what they are doing and wish to do it[39]. Hence the law may very justly, as Blackstone says our law does, look upon this drunkenness as rather an aggravation than a palliation of the offence[40]. *Involuntary drunkenness*, if this expression[41] means drunkenness caused by the artifice of others, is to be classed with *accident*[42]. *Disease* caused by previous voluntary drunkenness[43] cannot, as far as I can see, be separated from mental derangement in general.

In *voluntary* drunkenness, though it may not be what Austin seems to mean by *intentional*[44], and though the drunkard did not know what he was doing, it appears that he is punishable by English law *as if* he had wished or willed the act in question *or* intended its consequences. The effect of this presumption, which is at any rate fictitious, even if it be quite desirable, is, as Markby[45] points out, to make *drunkenness itself* an offence, which is punishable with a degree of punishment varying as the consequences of the act done. The rule has apparently been qualified in cases where a specific intention is essential to the crime, but I do not know that the qualification is very clearly established[46]. It is possible, however, that where there is reason to presume some intention, drunkenness may be taken into account to modify the character of the intention presumed. Where there is no

[38] Lect. 26, p. 512.

[39] See Markby, § 281, p. 144.

[40] Comm. 4. 2, p. 25, *ad finem*.

[41] Used by Stephen, Digest, Art. 20 (p. 17), note 2.

[42] See below.

[43] Stephen, l. c.

[44] *i.e.* contracted with a view to the commission of the crime.

[45] § 281, p. 145.

[46] See Stephen's Digest, Art. 29, Illust. 4, p. 17. Nothing corresponding in Code. The principal case is R. v. Cruse, 8 Carrington and Payne, 546. See also R. v. Carroll, 7 C. and P. 146.

such reason—nor perhaps to presume *volition* either—will not the least culpable form of intention be presumed[47]?

Blackstone's *reason* for the alleged rule of English law about drunken criminals—that one crime shall not be allowed to privilege another[48]—falls, of course, before the objection that drunkenness *per se* is not a crime[49]. The true ground of liability in this case is, as Austin points out[50], not volition, nor intention, but *heedlessness*.

In **childhood,** the *unconsciousness* may apparently be sometimes *actual*, sometimes only what I shall call *virtual*. Under *actual* unconsciousness should probably be classed the state of a very young child, many of whose movements are, just like those of a person in sleep, purely involuntary[51]. This must not be confused with the case of older children, whose actions are *not* involuntary, but who either do not know the immediate and necessary consequences of those actions, or, if they do, do not know that they are wrong or punishable. In both these last cases there certainly *is* volition, for the primary bodily movement is voluntary. In the first, however, the knowledge of those immediate consequences which all ordinary people would connect inseparably with the primary movement being wanting, volition should be treated as wanting for the *whole* act. In the baby the movement probably *is actually* involuntary, and it will naturally be *treated* as such in the *child*, who has never, e.g. seen or heard of a *gun* before, and so may reasonably be said *not to know what he is doing* when he pulls the trigger. This is therefore, in principle, a case of *virtual unconsciousness*.

[47] This seems to have been the course followed by the jury in R. v. Monkhouse, 4 Cox, 56.

[48] Comm. 4. 2, p. 26.

[49] Markby, § 279, p. 143, and note. Coke's (1 Instt. 247 a) is a case of *laches* by drunkard in a civil matter. See, however, Hale 1 P. C. 32.

[50] Austin, Lect. 26, pp. 512, 513.

[51] See *contra*, Stephen, G. V. p. 79.

Practically it is settled, in most countries, together with ignorance of the *wrongness* of the action, by a general negative presumption *juris et de jure*, when the child is proved to be under a certain age. But the complicated grounds of exemption, in the case of *infants*, will be shortly treated all together in a later chapter.

Inevitable ignorance of fact is also a case of *virtual unconsciousness*. The agent may wish to do, and believe that he does, one thing, which is lawful, when he is, as a matter of fact, doing another which is not lawful and which he has no wish to do[52]. This is the case where Blackstone says that the will and the deed act separately[53], for which he receives his due, and perhaps rather more than his due, share of criticism[54]. In truth, the presumption of volition is met by proof that the party *could not know* what he was doing. If he *could* have known, had he employed due attention or advertence; if his ignorance, that is, was *not* inevitable, but he had what is sometimes called a *latent* knowledge which he did not apply; although there was no exercise of will as to what he actually did, yet the degree of virtual unconsciousness, from which his conduct arose, is reasonably not held ground for exemption, though it is for diminution of criminality and mitigation of punishment. He is, in fact, liable on the ground of negligence, heedlessness or temerity[55].

The amount of attention or advertence required, to make the ignorance *inevitable*, will vary according to the degree of suspicion with which the law looks upon the act itself. This suspicion accounts for those cases where, though the act is

[52] For extra refinement, and, as it seems to me, unnecessary complication, on this subject, see Bentham's *unadvised* act, as to the *existence* of an important circumstance, and the first part of the chapter on *Consciousness* generally (Introduction, ch. IV. pp. 89—91).

[53] Blackstone, Comm. 4. 2, p. 27.

[54] See particularly Markby, § 257, p. 132.

[55] Austin, Lect. 25, p. 495.

not a crime unless some independent fact coexists with it, courts have held that the person does the act "at his peril[56]."

Inevitable ignorance is the real ground on which an *insane* person is not held responsible for an act which would be justified or excused by a state of things in which his delusion caused him to believe[57].

Virtual unconsciousness arising from *inevitable ignorance* characterizes also such **accidental** acts as the agent could neither foresee nor prevent[58]. Austin, I must remark, lays it down generally, that an *act* of a party cannot be called an accident[59]. I have referred to his narrowing of the ordinary sense of *act* before: here, I should prefer to say that an act of a party *may be* an accident, in which case it is not a *voluntary* act.

Where the party never knows what he is doing, to the moment of action, there is clearly an unconsciousness which precludes volition. In a large class, however, of "accidents," the party *does* know what he is doing but acts involuntarily. To use the popular language which I must employ as the best criterion of legal responsibility, he *cannot help it*. This brings me to the second class of involuntary actions, which I have roughly entitled *constraint*.

B. **Constraint** may be *actual*, *virtual* or *legal*. To the first head obviously belongs **physical compulsion,** where there is absolutely no volition of the person by whose body the act is done; as where another forcibly presses such person's finger against the trigger of a pistol. The *primâ facie* agent is not really the *agent* at all, but the instrument or means. This case is referred by Austin to *accident*[60], and I should be

[56] Stephen, Dig. Art. 34, and the case of Prince there referred to (Law Reports 2, Crown Cases Reserved, 151, especially Bramwell, B. pp. 174, 5). In the Code (§ 221) it is expressly provided that belief of the girl's being 16 shall be immaterial.

[57] Stephen, Digest, Art. 34. Ill. 1. See Code, § 22.

[58] Austin, Lect. 25, p. 493. See also below under 'constraint.'

[59] *ib.* [60] Austin, Lect. 25, pp. 514, 515.

disposed, conversely, to class under *actual constraint* any other instances of *accidental conduct* which might have been foreseen but could not have been prevented[61].

Actual constraint becomes, it must be remembered, *virtual voluntary action*, if the party places himself voluntarily in a position where he must be subject to the constraint. A similar qualification will be noticed shortly in *duress per minas*. The case here supposed is not one of *accident*, because it not only could have been prevented but was preconcerted.

Under actual constraint may be classed the case, roughly describable as omission, and barely conceivable now, where a man is legally punishable for not doing something which he *could not* do. Here Austin puts it that the party *is not obliged* or *cannot be obliged* by the original command of the legislator[62]. It would seem more correct to say that the legislator may impose such an obligation (for these will clearly be cases of direct despotic command), but will impose it ineffectually. Austin's dictum appears to me a confusion of legal obligation, as it ought to be and generally has been, with legal obligation as it may occasionally have been under a Cambyses or a Philip the Second.

Virtual constraint is a general term which will conveniently cover **self-defence, duress per minas** and all other cases of Austin's **extreme terror,** together with the questionable one of **irresistible impulse.** To all, it appears to me that Austin's words apply:—"The sanction may operate on the desires of the party, may be present to his mind, and the performance of the duty may not be altogether independent of his desires; but the party is affected with an opposite

[61] See above (*Unconsciousness*) for the remaining cases of accident in the original conduct: for accidental *consequences*, below, ch. IV.

[62] Austin, Lect. 23, p. 468. Cf. 26, 515.

desire, of a strength which no sanction can control, and the sanction therefore is ineffectual[63]."

Self-defence or, more properly, **self-preservation** is the overpowering motive in that hypothetical case of *unavoidable necessity*, which Blackstone recognizes as constituting, if not a legal involuntariness, at least an absolute excuse for homicide[64]. The term *self-defence* is more properly applicable to Blackstone's *excusable homicide, se defendendo, upon a sudden affray*[65]. (I may remark that the passage quoted by him from the Digest[66] only refers to a *civil* action, though the principle is reasonable enough for general application.) The *virtual constraint* here is very strong, and, in the case where the slayer has not begun the fight, that 'intention of the law' which 'holds the survivor not entirely guiltless' would perhaps at the present day be questioned[67]. The principle of self-preservation, extended to the case of *others* whom the agent was bound to protect, is generalized by Sir James Stephen, under the head of *necessity*, into an *excuse* of acts done, only in order to avoid consequences which could not otherwise be avoided, and which would have inflicted upon the agent, or such other persons, inevitable and irreparable evil, provided no more is done than was reasonably necessary for the purpose, and the evil inflicted is not disproportionate to the evil

[63] Austin, Lect. 26, p. 515. Bentham "The will is acted upon by an opposite superior force." Introduction, ch. XIII. § xi. p. 174.

[64] Comm. 4. 14. 186, where two persons, being shipwrecked and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. See Stephen, Digest, Art. 32, note 2, for an actual case.

[65] Comm. 4. 14, pp. 183, 4.

[66] Digest, 9. 2. 45.

[67] Blackstone, Comm. 4. 14. 184, *ad finem*, and 4. 14. 187. See, on the subject of private defence generally, and the necessary modifications in the law on this subject to suit the present day, Stephen, Digest, Art. 200 and note 1 on p. 125.

avoided[68]. This is at any rate good sense, and should be law[69].

Duress per minas is a special case of *self-preservation*, where the danger has been held out with the express intention of compelling the agent to commit a crime. Of course there is *volition* here—the act is distinctly that of the *primâ facie* agent—the question is, whether, as a matter of *policy*, he is to be exempted from criminal liability[70]. In the distinction drawn by Hale[71] between physical compulsion and moral force, he lays it down that even an assault on a man to the peril of his life in order to compel him to kill another is not a legal excuse. In treason, the mere joining with rebels may be excused, but only during continuance of actual force on the person and present fear of death[72]. It has in fact been laid down generally that the apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal[73]. These dicta are harsh and perhaps scarcely established law. *Duress per minas*, as an exemption from criminal liability, is, however, certainly confined in England, to compulsion, by threats of immediate death or grievous bodily harm, from a person present at the commission of the offence. It is questionable whether it covers acts committed by a *principal agent;* and it seems

[68] Stephen, Digest, Art. 32.

[69] The clause does not appear, in the same general form, in the Code (§§ 22—24). See, however, certain *particular* provisions, farther on (§§ 54—57).

[70] See Markby, § 287, p. 148: also Austin, Lect. 26, p. 515. It is surely incorrect here to say that "the sanction of the law is not operative, and therefore there is no obligation." It is rather true that the sanction *does* operate, but must, on all but the firmest minds, operate in vain.

[71] Hale, 1 P. C. 434.

[72] 1 East, P. C. p. 71 and M'Growther's case, 18 Howell's State Trials, 394.

[73] Denman, C. J., in Reg. v. Tyler, 8 Carrington and Payne, 621.

reasonable also to disqualify from this exemption any one who was a party to any association or conspiracy, being party to which rendered him subject to such compulsion[74].

I do not know whether the commission of crime under this influence merely of *great physical pain*, applied to compel such commission, would come under *actual constraint* or that difficult sub-division of virtual constraint, to be treated next, *irresistible impulse*. The case is not, at present, very likely to occur.

Irresistible impulse belongs mainly to the subject of present mental derangement. It is not yet, I believe, expressly recognized by our law, though often alleged by medical witnesses, and sometimes forming the ground of pardon or reprieve. Is it true, that a man may murder another, knowing what he is doing, knowing that it is morally wrong, knowing that it is legally punishable but yet unable to resist the impulse? Can it be reasonably said that *he could not help it?* Experience, I believe, shews that there are such cases, and yet that the conduct of such a person is not traceable to any specific delusion[75]. Proof that this impulse *was* irresistible will vary according to the particular circumstances: but, if it be satisfactory to the minds of reasonable men, they ought perhaps to hold that the act was not voluntary and acquit the prisoner[76]. Certain medical authorities shew a disposition to extend this excuse to cases

[74] Stephen, Digest, Art. 31, and Code, § 23.

[75] See generally the cases in Maudsley, chaps. v. and vi. (Partial Insanity).

[75] Stephen (G. V. p. 95) seems to admit this. In the Digest (Art. 27, C, and Illustrations, pp. 15, 16) he treats the fact whether the principle here advanced is part of our actual law as doubtful. It clearly does not come within the words "incapable of appreciating the nature and quality of the act." See the remarks of Mellor, J., in R. v. Cockroft (Leeds Autumn Assizes, 1865), Taylor, 753; and, as against the admission of irresistible impulse, Parke, B., in R. v. Barton, 3 Cox, 276 and Bramwell, B., in R. v. Haynes, 1 Foster and Finlason, 667.

where the act has been done *deliberately:* but it seems reasonable to confine it to sudden fits or paroxysms[77].

With regard to the *furious anger* alleged by Austin as a ground of exemption in Roman law[78], if there is any authority for the doctrine, which I have been unable to find, its principle would probably be the same as in the case of irresistible impulse.

Exemption on the ground of **legal constraint** can only occur in the case of criminal actions performed *bonâ fide* under the orders of a properly constituted superior. Whether such orders are *per se* a ground of direct exemption at all in English law appears to be doubtful[79], except in the case of married women, to be noticed directly.

Under *defect of will,* Blackstone refers to "compulsion and inevitable necessity[80]," acts of a violent character *per se* which result from the "commandment of the law[81]" and acts "contrary to religion and sound morality," but done under the obligation of "civil subjection[82]." With the first class may obviously be coupled what is justifiable "rather by the permission than by the absolute command of the law for the advancement of public justice or the prevention of atrocious crime[83]." None of these acts enumerated by Blackstone are criminal at all[84].

The exemption of a *married woman* from criminal liability, on the ground of presumed coercion by her husband,

[77] Case of Dove. Stephen, G. V. pp. 401, 2. I think even Dr Maudsley (p. 149) would scarcely extend exemption to cases where the act was actually performed in cold blood.

[78] Austin, Lect. 26, p. 513. [79] Stephen, Digest, Art. 202.

[80] Comm. 4. 2, p. 27.

[81] *ib.* 4. 2, p. 31. See Hale, 1 P. C. 43. [82] Blackstone, Comm. 4. 2, p. 28.

[83] *ib.* 4. 14, p. 179. He is only speaking of *homicide:* but I do not see why his remarks should not have application *a fortiori* to other acts.

[84] For "Cases in which infliction of bodily injury is not criminal," see generally Stephen, Digest, Pt. v. ch. 21.

only extended to minor cases[85], was only a *præsumptio juris* (not also *de jure*[86]) so that proof was admissible against it, and will probably be shortly abolished[87], though it would seem reasonable that less *proof* of constraint might be accepted as to the actions of a woman in her husband's presence than in other cases.

Forbearances and omissions. I have now briefly considered the cases where a person has *done* something, but yet the act, with the more immediate consequences included under the usual meaning of that term, either is *involuntary* or is reasonably treated as such, and the agent is therefore exempt from liability for what is virtually not his doing. I shall further have to treat; on the *external* side, of the less immediate consequences of a man's voluntary act; on the *internal* side, of mental condition preceding such an act, and lying behind the volition which causes it.

It will be necessary, however, first to give a little consideration to the immediate circumstances of a **non-act**; the case, that is, where criminal consequences are imputable to a person because he has *not* done something. In this case, his conduct must have been either a **forbearance** or an **omission.** The frequent confusion of the two is justly censured by Austin[88], and the distinction which he has drawn between them is of considerable practical importance in criminal responsibility. A man, unacquainted with driving, takes in hand a team which he is assured is perfectly quiet: the horses bolt and kill a foot passenger. A nurse wilfully abstains from administering the stimulant ordered by the

[85] See Russell, 1, p. 140, note *o*. Blackstone's distinction (Comm. 4. 2, pp. 28, 29) of *mala in se* and *mala prohibita* is not satisfactory here (or anywhere else).

[86] See Hale, 1 P. C. 516.

[87] Compare Stephen, Digest, Art. 30, with Code, § 23.

[88] Austin, Lect. 14, p. 377.

doctor as of vital consequence to the patient; and the patient dies. The first case will scarcely amount to manslaughter, the second is very like murder.

The subject of **omission**, properly so called, has been very much overlooked by our old common-law writers, who have consequently been driven to such legal hypotheses as *malice against all mankind*[89]. **Forbearance** would in general be indicated, with a nearer approach to truth, by such quasi-active words as *wilfully abstaining*, &c. But, even down to modern times, a clear distinction between the two is not easy to draw, because of a double use of the word *omission*, arising doubtless from the attractive antithesis between *omission* and *commission*. Hence, omission has been extended to *all non-doing*, so as to include forbearance, or *intentional* non-doing, as well as omission proper, or *unintentional* non-doing[90]; and to require division into *malicious* and *negligent*[91]. In the criminal code now under consideration *omission* clearly includes *intentional* conduct, which is specially called *wilful* omission[92].

It is probable, then, that this double and ambiguous use of the word *omission* will hold its own in English legal phraseology, partly because it is, as we see, pretty firmly established there, and partly on account of a special meaning popularly given to *forbearance*, which somewhat incapacitates that term for substitution in place of *wilful omission*. By *forbearance* is often meant, as Austin remarks[93], the intentional non-doing of an act which we are *bound* not to do or justified in not doing. While, as he himself uses the word,

[89] *e.g.* Blackstone, Comm. 4. 14, p. 192.

[90] Austin, Lect. 20, 439.

[91] Markby, § 219, p. 107.

[92] Code, § 172. "Act or omission," § 194, "wilful omission or neglect." See Stephen, Digest, Art. 212. *Neglect* is also used of intentional conduct in Code, §§ 185, 6.

[93] Austin, Lect. 20, p. 438.

it is *not* restricted to *lawful* forbearances, but applies to any act whatever. I must here follow Austin, in the teeth of established usage[94], as to the meanings given to these two words, on account of their great clearness and convenience.

Forbearance and **omission** are, then, both, as regards externals, the not doing something which a person could have done. The difference lies entirely in his state of mind, and is very well drawn by Austin. The only obscurity in his account of the matter seems to arise from the introduction of his unlucky *particular volitions*. **Omission** is the simpler case, and the simplest case of omission is, where a man does not do an act because he never thinks about it[95], and of course never wills to do it. "The will," to use that popular abstraction, is perfectly dormant: there is no volition whatever.

A less simple but more common form of *omission* is where something *is* done—there *is* an *action*—but, in the *manner* of doing it, the taking of certain *precautions* is omitted, from the same state of mind as leads to omission of an act altogether.

It was stated above that forbearance and omission are both the not doing something *which a person could have done*. This presumption of the faculty of volition, the *power* of willing and doing, is essential. To use, as an illustration, Austin's favourite word *advert;* there can be no *inadvertence* unless there is a mind (with the necessary knowledge), to *advert;* and so, a blind, or illiterate, person cannot *omit* to read a royal proclamation.

Omission is often used only for *culpable* omissions; when we unintentionally do not do something which we are bound to do[96]. There is no great objection to this narrowed meaning in the present subject, because these are the omissions with which we have mainly to deal in criminal law. Still, I sup-

[94] Austin, Lect. 20, p. 439. [95] 'adverts to it.' *ib.* 438. [96] *ib.*

pose the word *per se* should mean the unintentional non-doing of *anything*.

Forbearance, on the other hand, is a not doing "with an intention of not doing[97]," where *intention* is obviously used by Austin rather in the ordinary meaning of *purpose* than in his peculiar meaning which will be considered hereafter. At present, I am confining myself to the *immediate circumstances* of not doing and, as much as possible, to the state of mind relating merely to the non-act. For which reason, I prefer another definition given by Austin of forbearance, where he says it is "the not doing some given external act, and the not doing it in consequence of a determination of the *will*[98]." The difference between omission and forbearance lies in that *exercise* of *volition*, which enters into the latter, and about which Austin involves himself in what certainly appear very unnecessary difficulties. He sees and admits that there is an "act of the will" in forbearance: but, he says, the forbearance *itself* is not willed, because we cannot will *nothing*, the absence or negation of an act[99]. He has therefore to assume that, in forbearance, as we do will something, we will an act *other* than the act forborne, and excluding it[100]. And, in the end, he is obliged to admit that a present forbearance is *not* necessarily preceded or accompanied by a present volition to do another act: but may be preceded or accompanied by mere inaction[101].

The views of Hobbes and Locke are, I think, much clearer. Hobbes connects *Deliberation* directly with the doing or omitting the thing propounded, and the will (i.e. the act of willing) directly with the action or the omission thereof[102]. By *omission* he here obviously means what I have called,

[97] Austin, Lect. 20, p. 439.
[98] *id.* Lect. 14, p. 377.
[99] *id.* Lects. 19, 20, pp. 437, 8.
[100] *ib.*
[101] *id.* Lect. 21, p. 452. See also note 76 to page 438.
[102] Leviathan, 1, ch. 6, p. 28.

following Austin, forbearance: but the point to be remarked is that he places action and forbearance on the same footing, and feels no necessity for interposing a *tertium quid*, which is to be *willed*, inconsistent with the thing forborne. "To avoid multiplying of words," says Locke[103], "I would, under the word action, comprehend the forbearance too of any action proposed: sitting still, or holding one's peace, when walking or speaking are proposed, though mere forbearance, requiring as much the determination of the will, and being as often weighty in their consequences as the contrary actions, may... well pass for actions too." Common experience, in fact, shews that in forbearance we do not will an act exclusive of the act forborne, but will to stay just as we are: the ordinary popular expressions in such cases point not so much to the notion of positive inconsistent action, as to the restraint of ourselves from action at all[104].

One thing is certain in forbearance, that, whether its *modus operandi* be a remaining at rest or an act excluding the act forborne, it is *an exercise of volition*, and therefore will in general involve a greater liability for consequences than *omission*, where the volition is dormant. On the one hand, however, *exercise* of volition cannot be so reasonably *presumed* in the case of non-act as in the case of act. If a man *does* something, we *primâ facie* assume that he willed to do it. If he *does not do* something, we do not assume either that he *willed* not to do it or that he never thought about it, without going into his probable desires or intentions—his condition of mind, with reference to more remote consequences. On the other hand, even in the case of a clearly proved *forbearance*, although this is in all mental conditions exactly on a level with *action*, and may be preceded

[103] Essay 2. 21, § 28.

[104] ἔχ' ἡσυχῶς—siste—stop! all properly transitive verbs, but expressing action merely upon one's self.

by the strongest wish, and even purpose, so far as the forbearance is concerned, of consequences which would be criminal when resulting from a positive act: yet, if the train of events which ends in these consequences is not due in any point to the person, who is merely a complacent spectator, he does not appear to be, in actual legal systems, *criminally* liable, whatever *moral* abhorrence his conduct would naturally excite; unless the act from which he forbore was one which he was under a *legal obligation* to perform[105]. There is, however, little doubt that any such cases which became frequent, and so, capable of being dealt with generically, would lead to the speedy imposition of legal obligations to meet the emergency[106].

[105] See the very strong illustration, I presume hypothetical, in Stephen's Digest, p. 135, and the statement in the text (Art. 212). "It is not a crime to cause death or bodily injury, even intentionally, by any omission, other than those referred to in the last article."

[106] Cf. the rules and cases in Stephen's Digest, ch. 22, and compare Part xv. of the Code, and below end of ch. ix.

CHAPTER IV.

ESSENTIALS OF CRIMINAL LIABILITY, CONTINUED.

Offender's knowledge as to the probable consequences of his conduct.

VOLITION, including not merely the exercise but the power or capacity of will, has been sufficiently considered as connected with the offender's conduct, whether act, forbearance or omission, and the more immediate consequences which are generally coupled with that conduct under the word *act*.

I proceed now to the remoter mental condition which causes or further characterizes the conduct, and so renders the offender criminally liable for that conduct's results. At first sight such condition would appear to consist simply of *desire*, positive or negative—Hobbes' "Appetites and Aversions, Hopes and Fears." But it is obvious on a little thought that a more important essential, to which desire may or may not be superadded, is *expectation*, or rather the *grounds of expectation*. And here the use of the term *knowledge*, in the latter part of Chapter I. and the heading of this Chapter, must be explained.

Expectation, when very strong and well founded, is often styled **Knowledge** — or, *e converso*, what is often styled knowledge, as to the future, is really only a strong expectation. Thus Austin himself speaks of *knowing* that a thing

will happen[1]. This expression is, strictly and literally taken, incorrect: we can only *know* what is happening or has happened; as to future consequences, our so-called knowledge is merely a strong expectation, which may amount to what we call *moral* certainty but is not certain in *fact*.

If, however, we change the phrase to, knowledge that so and so *is likely* to happen, the word *know* has now a strictly proper meaning, though its object, in that meaning, is not very clearly expressed. As applied to our own conduct, the expression *knowledge that such a result is likely*, obviously means, our knowledge that similar results have followed, and do ordinarily follow from similar conduct. As applied to the conduct of others:—When I say to a fellow, who has thrown or fired a detonating ball so as to fall into a powder magazine—*You knew it would blow up*—I mean, I assume that you knew, either through your own experience or through the experience and information of others, what have been the results, what are the ordinary results, of such dealings with powder and detonating balls. I may make a wrong assumption, (or *pre*sumption as it is called when the courts make it,) but that is what I mean; and this is correctly called knowledge. Such knowledge might of course be *proved* by entering into the previous life of the individual; but common sense shews that such an enquiry would be in general not only troublesome but trivial and unnecessary. The mere fact that such speeches or imputations, as I have instanced, are made every day, in the practice both of courts and ordinary life, points to the existence of some *general experience*, common to those amongst whom a person lives, and an assumption that, as so living, he has that experience for a guide to the probable results of his conduct.

[1] Austin, Notes on Criminal Law, p. 1093.

A *special* standard of experience exists, and may be reasonably assumed in individual cases, amongst *professional* men. An engineer for instance, would be presumed to know the results of certain conduct with reference to an engine—a gasman with reference to gas—a man who took any post or occupation with reference to the duties of that post—better than an ordinary person[2]. This special presumption is an important point, but it seems to me to come under the same general principle as the former.

Broadly stated, the presumption is this—a man is taken to know, as to the probable consequences of his conduct, what most people in his position would know. In law, this is a *præsumptio juris*, but not also *de jure*, for special circumstances of ignorance may be shewn, to rebut it, in the case of *individuals;* and, in the case of some *classes* of persons, there is a counter presumption.

The next essential, then, of criminal liability, besides those already considered, is the agent's *knowledge*, that is, his expectation or capacity of expectation, of the consequences of his conduct: "the party expects the consequences inconsistent with the objects of his duty," (more shortly the *criminal consequences*)—"or he *might* expect such consequences if he adverted or attended as he ought[3]." His *guilt* or *liability* will materially vary in *degree*—the results produced being the same—as his state of mind turns out to have been actual expectation, or the mere capability of it, and as his actual conduct was more or less likely to cause the results which it did cause, and therefore to suggest to him the expectation of them. But the capacity for such expectation must be there, or the party is, except in one anomalous case, noticed below, not liable at all.

The experience, knowledge, or capacity of expectation, of which I am now speaking, is, as I have said, *presumed*,

[2] Markby, p. 108, §§ 220, 221. [3] Austin, Lect. 25, p. 484.

and reasonably presumed by law. The exemptions, therefore, or cases of non-liability, under this particular head, will be either where there is a counter presumption (the case of *infants*), or where it is *proved* that the offender *could* not foresee the consequence of his conduct[4]. It is sometimes said that such a person 'does not know what he is doing,' but this phrase is best confined to the more immediate consequences of bodily movement.

This want of knowledge has been, in our cases, often rather confusedly combined with want of knowledge of the wrongness or punishability of the act and its consequences taken together; *e.g.* the question is put "whether the prisoner was labouring under that species of insanity which satisfies the jury that he was quite unaware of the *nature, character* and *consequences* of the act he was committing—*in other words* was really unconscious, at the time he was committing the act, *that it was a crime*[5]." The Solicitor-General speaks, in Lord Ferrers' case, of sufficient faculty "to *distinguish the nature of actions*, to *discern the difference between moral good and evil*[6]." The prisoner's being "insensible of the *nature* of the act he was about to commit" and "*disabled* from *discerning* that he was doing a *wrong act*," are apparently, from their connexion with the same phrase about *illusion*, spoken of as the same thing[7]. There is a like want of clearness, in the language of English practice, with regard to infants under 14 and over 7 years of age. Here, in felonies, it is left to the jury to say whether, at the time of committing the offence, the person *had guilty knowledge that he was doing*

[4] Austin, Lect. 26, p. 506, "*did* not and could not." If the second negative has to be proved, the first is clearly unnecessary.

[5] Oxford's case, 9 Carrington and Payne, 547.

[6] Howell's State Trials, 19. 947.

[7] Bowler's case, Collinson on Lunacy, p. 673 (*addendum*).

wrong[8]. It may be that a knowledge of the act's *probable consequences* does not enter into the question just quoted, but is *presumed*—a strong argument that such is *a fortiori* the general presumption in the case of *adults*. (The case of infants is taken all together hereafter.)

Foresight of consequences, however, as a separate thing, is clearly alluded to by the judges in answers 2 and 3 to the questions put on the celebrated case of McNaghten. To establish a defence, it must be proved that at the time of committing the act the accused was labouring under such a defect of reason from disease of the mind as not to know the *nature and quality* of the act he was doing—*or*—if he did know it, that he did not know he was doing what was *wrong*[9].

On the whole, it is clear that, in English law, and in reason, all persons but very young children are presumed to have *known* the *probable consequence* of their conduct, (besides those more immediate consequences which are generally regarded as part of an *act* itself,) and are held criminally in some degree responsible for such consequences, unless it can be proved that they are incapable of such knowledge.

There are three cases of such proof which practically occur. The first is that of **incapacity** from **general defect of understanding** or **mental derangement.** The second is the curious and difficult case of **partial insanity** and **delusion**, which often complicates the question of the present chapter with that raised in the preceding and in the following one. The third is **pure accident.**

The first case does not call for much remark. It is described, in language more strong than coherent, by a judge in an early case. To be acquitted, on a charge for a great

[8] R. v. Owen, 4 Carrington and Payne, 236.

[9] 10 Clark and Finnelly, p. 210.

offence (malicious shooting at a person), a man must be totally deprived of his *understanding* and *memory* and *not know what he is doing*, any more than an infant or brute or a wild beast[10]. Without pressing the curious classification of creatures contained in the last words, we may say that '*understanding and memory*' indicate experience and foresight of consequences. A proved general incapacity to foresee the consequences of the offender's conduct would doubtless be now held sufficient to constitute this exemption[11].

The difficulty of **partial insanity** is pointed out, but certainly not solved, by Hale[12]. In later times, ignorance of the nature and consequences of one's conduct has been here much confused with ignorance that the conduct was *wrong*. Against this, Erskine's famous argument in Hadfield's case shews clearly that where the agent was under an entire delusion as to his act and its consequences, no jury could possibly convict him of murder, *merely* because he knew that he was acting *wrong* or *contrary to law*[13]. The case put by Erskine is hypothetical, but one cannot help feeling that a true principle is laid down in the question submitted by a test-writer of great eminence—whether the agent committed the act under the influence of any insane delusion, disguising from him its murderous character[14].

It is difficult to lay down a general rule for these cases. "That the delusion must, for the purpose of the trial be

[10] Arnold's case, 16 Howell's State Trials, 765, per Tracey, J.

[11] The act and its consequences are generally coupled together in our law. "No act is a crime if the person who does it is at the time when it is done prevented [either by defective mental power or] by any disease affecting his mind (*a*) from knowing the nature and quality of his act, &c." Stephen, Dig. Art. 27, p. 15. The part bracketed is doubtful.

[12] 1 P. C. p. 30.

[13] See Stephen, G. V. p. 92. Erskine's Speeches (Ridgeway) 4, pp. 133, 4. Collinson on Lunacy, p. 480, omits the details of Erskine's argument.

[14] Stephen's Blackstone, VI. 2, p. 28, note *x* (7th ed.).

taken to be true[15]," seems scarcely to supply a universal solution. If the consequences anticipated by the agent varied very slightly from the real ones, there would seem no great injustice in holding him liable for the latter: if very widely, the case approximates to that of purely accidental consequences.

The case of **purely accidental consequences** differs from that of accident as to the *act* itself, in the fact of the original conduct being there *involuntary* and here *voluntary*. Blackstone is therefore not correct in speaking of a "deficiency of *will*" when the "want of foresight or intention" only applies to the *consequences*[16]. He is also somewhat unsatisfactory in his treatment of *accidental mischief* which follows from the performance of a *lawful act*, in which case he first states that, as a general rule, the party stands "*excused* from all guilt[17]:" but afterwards, that where the consequences amount to *homicide* (homicide *per infortunium*), "the word *excusable* imports some fault, some error or omission: so trivial that the law excuses it from the guilt of felony, though, in strictness, it judges it deserving of some little degree of punishment[18]." Here, in fact, the law, according to the same author, presumes a certain want of caution, implying that the consequences *might* have been foreseen, and therefore holds this a case rather for excuse than exemption[19].

Other authorities add the words "using proper caution to prevent danger" to their statement of the case in point, rendering it pure matter of accident, as to the consequences which could not have been expected to result[20]. This very

[15] Stephen, G. V. p. 92. I am not, indeed, sure that Sir James Stephen means to lay it down as a general rule.

[16] Comm. 4. 2, p. 26, *ad finem*.

[17] *ib.* 4. 2, p. 27.

[18] *id.* 4. 14, p. 182.

[19] *ib.* 186, *ad finem*.

[20] 1 East P. C. c. 5, § 8, p. 221. Foster, Disc. 2, p. 258.

proper addition—the employment of diligence or precaution—is indicated by Coke[21], and is as old as Bracton[22].

Austin appears to exclude from the class of accidents *all* mischief resulting from the act of a party[23]. This is too general, unless we add the words "and which could have been foreseen by him." Whatever mischief results from conduct which is dangerous, or from which such mischief might reasonably have been expected[24], is *not*, of course, *pure accident.*

There is an anomalous case, to which reference has already been made, where neither expectation nor a ground for expectation of the actual consequences of conduct can reasonably be presumed, and yet the party has been, by English law, held liable for those consequences. This is the case in which *the consequences result from an unlawful act*, but are *purely accidental:* that is, the act is not done with the purpose of causing them, and their occurrence is not so probable that a person of ordinary prudence ought under the circumstances to take reasonable precautions against them[25]; where, in fact, there is neither rashness, heedlessness, nor negligence. The unlawful act in this case may apparently, in English law, be nothing more than a *private wrong*[26]; but the principle has been most strongly

[21] Instt. 3, cap. 9, p. 57. Yet he shall forfeit therefore all his goods or chattels to the intent that men should be *wary* so to direct their actions as they tend not to the effusion of man's blood.

[22] Bracton, L. 3, c. 4, fol. 121. Casus...si licitae rei operam dabat...et adhibuit diligentiam.

[23] Austin, Lect. 25, pp. 492, 3.

[24] *e. g.* dangerous and unlawful sports or the use of weapons of an improper and deadly character in lawful sports. See Russell, 1. 819, 820.

[25] From Stephen, Digest, Art. 210.

[26] *ib.* 11. "Acts constituting actionable wrongs." It must also be according to Hale (2 P. C. 476) and Foster (Disc. 2, p. 259) in its original nature wrong and mischievous, not merely *malum prohibitum* (Blackstone, Comm. 4. 2, p. 27, note 6). But this distinction is untenable (Stephen, Digest, Art.

developed in the more serious cases called felonies. The extremely harsh dictum of Coke[27], according to which the agent is to be held criminally liable to the fullest extent, and in the highest degree, for death accidentally resulting from an intentional act, unlawful but not necessarily dangerous, has been somewhat modified by the merciful interpretation of a later and more rational authority[28], but appears, in its very slightly modified form, to be still English law[29]. And it is laid down, in general, by Blackstone, that if a man be doing anything unlawful, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for being guilty of one offence in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour[30].

In a minor degree it is perhaps not unreasonable that the accidental results of an unlawful act should be imputed to the author of that act, though he neither did nor could expect them. If, in a case mentioned above, inevitable ignorance as to an independent fact constituting his act unlawful did not excuse the agent[31], still more, it may be urged,

210, note 2, p. 131). In his *text*, Blackstone extends this doctrine to an original doing of *anything unlawful*.

[27] If one shoot at any wild fowl upon a tree and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is *per infortunium*, for it was not unlawful to shoot at the wild fowl: but if he had shot at a cock or hen, or any tame fowl of another man's, and the arrow by mischance had killed a man, this had been murder, for the act was unlawful. Coke, Inst. 3. 8, p. 56. The dictum appears to be based on decided cases.

[28] Foster, who (p. 258) requires that the intent must be *felonius*.

[29] Cockburn, L. C. J., in Barrett's case. Stephen, Dig. p. 146, note 4. See also Russell, I. 761, note (*w*). A more rational view is as old as East, 1 P. C. p. 257.

[30] Blackstone, Comm. 4, cap. 2, p. 27. For the distinction of *malum prohibitum* or *malum in se*, see above, note 26.

[31] Ch. III. note 56.

ought a man to do *intrinsically* unlawful acts *at his peril.* But for *full legal liability,* if the dictum be not yet law, it is at least common sense and justice that "a man is not answerable except for the natural or probable result of his own act[32]."

The legal presumption as to the *possession of ordinary experience* extends, it would seem, to the *application* of that experience, with regard to the probable results of a man's own conduct, in cases of *act* or *forbearance.* A defence, that is, would scarcely be admitted that the experience lay *dormant,* where there had been a volition. As it has been laid down, "a party who does an act wilfully, necessarily intends that which must be the consequence of the act[33]; where *intend* certainly includes *expect,* whether it includes something more or not.

In the case of *pure omission,* i.e. when the party does not merely neglect to take some precaution in connexion with some positive conduct, but, instead of doing what he should do, never thinks of it and does nothing at all, the last-mentioned presumption evidently does not hold. He neither actually knows, nor is held to know, such a result of his conduct to be likely: he is only presumed to have had the experience which would enable him to know it; and he is punishable for the non-application of that experience, which will be noticed hereafter as "negligence."

[32] Bramwell, B., in Reg. v. Horsey. 3 Foster and Finlason, 287. It is not certain, however, that the learned baron's dictum does not rather bear on remoteness of causality, from the intervention of *another cause,* than on the intrinsic naturalness and probability of the result. See the editors' notes.

[33] Farrington's case. Russell and Ryan, 209. The words which follow are applicable only to the particular case; they do not appear to limit the general maxim.

CHAPTER V.

ESSENTIALS OF CRIMINAL LIABILITY, CONTINUED.

Offender's knowledge that his conduct was wrong.

It is laid down by Blackstone that "a mistake in point of law which every person of discretion not only may, but is bound and *presumed* to know, is in criminal cases no sort of defence. *Ignorantia juris quod quisque tenetur scire neminem excusat* is as well the maxim of our own law as it was of the Roman[1]." About the Roman law on this subject I wish to make a few prefatory remarks, because the references to it by both Blackstone and Austin are very unsatisfactory. The quotation of Blackstone is stated to be Digest 22. 6. 9. It is really a compound[2] of the passage referred to (a dictum of Paulus) with another proceeding from the pen of Neratius Priscus, Trajan's favourite councillor, and at one time, perhaps, intended successor[3]. The singular weakness of the reason—that *law* both can and ought to be finite, whereas the interpretation of *fact* may deceive even the most skilful—is pointed out by Austin[4]. He might have added, too, how

[1] Comm. 4. 2, p. 27.

[2] Probably made by the author, whom Blackstone cites, Plowden, 343.

[3] Dig. 22. 6. 9. pr. Paulus libro singulari de juris et facti ignorantia. Regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere. Dig. 22. 6. 2. Neratius. In omni parte error in jure non eodem loco quo facti ignorantia haberi debet, cum jus finitum et possit esse et debeat, facti interpretatio plerumque etiam prudentissimos fallat.

[4] Austin, Lect. 25, p. 497.

completely the last words really apply to *law;* especially to judiciary or case-law, on which I shall shortly have to quote his own words.

To return, however, to the Roman authorities: Paulus, in the passage above referred to (from his work *de juris et facti ignorantia*), after stating the general rule, *juris ignorantiam cuique nocere facti vero ignorantiam non nocere,* proceeds to say that, to minors of 25, *jus ignorare permissum est, quod et in feminis in quibusdam causis propter sexus infirmitatem dicitur*—instancing the case of a *civil* act in law. He quotes afterwards, with evident suspicion, a dictum of Labeo. *Sed juris ignorantiam non prodesse Labeo ita accipiendum existimat si jurisconsulti copiam haberet vel sua prudentia instructus sit; ut, cui facile sit scire ei detrimento sit juris ignorantia* (*Mommsen* supposes a converse clause to have fallen out here:—*cui non facile sit scire ei detrimento non sit*): *quod raro accipiendum est*[5]. These are the passages which are very inadequately quoted by Austin in his 25th lecture[6]. The title in the Codex, *De juris et facti ignorantia,* adds nothing but the permission enjoyed by a soldier to amend his pleadings in a civil case, *propter simplicitatem armatae militiae*[7]. In almost all cases treated under this head, the dicta appear to refer to *civil,* not *criminal,* law: nor can I find any clear distinction as to *jus gentium* and *naturalis ratio*[8]. A few other passages relating specially to *infants* will be noticed at the end of this chapter.

We may now leave the Roman law of Justinian on this subject, and consider certain maxims taken from it, with more or less garbling and more or less disregard of context, by our own older lawyers or judges, and made by them into

[5] Dig. 22. 6. 9. 3.

[6] pp. 497, 500, 501.

[7] Codex, 1. 18. 1.

[8] Laid down by Austin, p. 501. The strongest instance is in Dig. 48. 5. 38. 2.

English common law. Serjeant Manwood is, I believe, our first *court* authority, speaking as *advocate*, not judge, in a civil case under Elizabeth[9]. "It is to be presumed that no subject of this realm is misconversant of the law whereby he is governed. Ignorance of the law excuseth none[10]." This dictum, adopted by Hale and applied by him to criminal cases[11], is no doubt the original of Blackstone's 'bound and presumed to know;' the 'not only may[12]' being probably due to Neratius. However, Blackstone's support of the rule comes to this:—a man *may not* allege ignorance of the law because he is *juris et de jure presumed* to know it. He is so *presumed* because he is *bound* to know it. Such circular reasoning[13] need scarcely detain us, nor is it much more worth the while to consider Blackstone's theory, about the *enactment* of our own *statutes*, that "every man in England is, in judgement of the law, party to the making of an act of parliament, being present thereat by his representatives[14]" so that *promulgation* is not needed. Assuming every person in England to be represented—assuming the copies of acts of parliament "printed at the King's press for the information of the whole land[15]" to be a sufficient reminder to those persons of what they, not to say their ancestors, have enacted, through their representatives—we still have remaining the vast mass of *case-law*, which must occur in some form or other through all modern systems. Nor does the English theory, of judges merely declaring or interpreting what *was law before*, help

[9] Plowden, 342 a. (10 Eliz.).

[10] It is really a quotation by Manwood from the "Doctor and Student."

[11] 1 P. C. 42. [12] Above, note 3.

[13] See Austin, Lect. 25, 498. Markby, p. 138, § 271.

[14] Bl. Comm. 1. 2, p. 185. In its original this is a ruling of Thorpe, C.J., in 39 Edw. 3. Coke, 4 Inst. 1, p. 26.

[15] *ib.* Proclamation by the Sheriff in each county, or at least the writs commanding such proclamation continued according to Coke (*ib.*) till the reign of Hen. VII.

us in the least: as the unlearned laity would have to interpret or discover by their own intuition that on which the greatest professional authorities occasionally differ, and the original publication of which is, as Blackstone himself admits, only a supposition[16].

Before leaving Blackstone's theory, as to the actual knowledge of *Statutes*, I may mention that, where the ignorance was of a law *very recently enacted*, so that the offender could not have known of the act, notice of which could not have reached him before the offence was committed, it was considered a case for *pardon*, but Lord Eldon held that such offender was in strict law bound, although he could not then know that the act had passed[17]!

The assumption that the English law or any large and increasing body of laws 'might be known' by the laity, on which ground Blackstone bases the non-admission of ignorance as a legitimate excuse[18], is an absurd one justly scouted by Austin[19].

The *rule*, however, that ignorance of law shall not be so admitted remains, and is justified by the latter author, relying, in a very characteristic passage, entirely upon considerations of necessity or convenience, and paying certainly very little regard to what ordinary people call justice or equity. I shall not reproduce this passage[20], the reasoning of which appears to me to be conclusively answered by Markby[21]; but would call attention rather to others, in which Austin admits that the presumption now under consideration

[16] Int. § 2, 45. It (municipal law) may be notified by universal tradition and long practice which *supposes a previous publication* and is the case of the common law of England.

[17] Russell and Ryan, Cr. Ca. 1. Bl. 4. 2. 28, n. 7.

[18] Blackstone, Int. § 2, p. 46. [19] Austin, Lect. 25, 498.

[20] Austin, Lect. 25, pp. 498, 499. The only sufficient reason...insoluble and interminable.

[21] Markby, §§ 272, 3, pp. 138, 9.

is *really true* in the majority of instances[22], and might possibly be made so in a vast majority[23]. For the former fact I will here quote his remark on the most unfavourable instance —of *case-law*. "As to the bulk of the community they might as well be subject to the mere *arbitrium* of the tribunals, as to a system of law made by judicial decisions. A few of its rules or principles are extremely simple and are also exemplified practically in the ordinary course of affairs: such, for example, are the rules which relate to certain crimes and to contracts of frequent occurrence: and of these rules or principles the bulk of the community have some notion. But—" then he reverts to his first dictum, as to the more complex portions of judiciary law[24].

The remarks of the author whom I have cited, as justly objecting to Austin's reasoning on the rule "Ignorance of Law excuseth none," are, I think, confined to *criminal* law; on which he makes the enquiry—Will the defence of ignorance of criminal law be generally false or true, i.e. do people in general *know the criminal law*, or not? His answer is well worth reading. If this means a "particular and accurate acquaintance with the terms of the law," of course such knowledge is possessed by scarcely any one. But if it means generally that such and such an act (the term here including the *criminal consequences* of an act or forbearance), will expose him to some sort of criminal punishment, this knowledge *is* possessed by nearly every one above the age of infancy, as to nearly every act for which he is liable to be criminally punished[25].

It would seem to follow that in *doubtful matters of conduct*, such as the resistance to a not very obvious right, or the obedience to a proper authority giving improper orders, this presumption of a general knowledge of criminal law must be

[22] Austin, Lect. 26, p. 510. [23] *id.* Lect. 25, p. 499.

[24] Austin, Lect. 39, pp. 674, 5. [25] Markby, §§ 274, 5, pp. 139, 140.

considerably qualified. The hardships which occasionally occur have apparently been met, in practice, by a somewhat technical treatment[26], for which a layman would prefer the general qualification or exception here suggested.

A different and more difficult question arises, as to the rule under consideration, where it has been held to be no defence for a *foreigner*, that he did not know he was *doing wrong*, the act not being criminal in his own country[27]. In the case from which these words are quoted the act was one which would have been *morally* reprobated in *both* countries; and, in a similar one, though the act might not have been looked on with moral reprobation in the foreigner's own country[28] it was one of a violent and deadly character.

These somewhat doubtful cases may, of course, be practically settled by saying that a foreigner who comes to England must obey the laws of the country and be content to place himself in the same situation as native-born subjects[29]; but they will at least serve to introduce a new and a very important consideration as to the *rationale* of liability.

The presumption of knowledge of the law in criminal cases, which seems, taken in a general sense, to be just, has

[26] Stephen, Digest, Art. 33. The fact that an offender is ignorant of the law is in no case an excuse for his offence, but it may be relevant to the question whether an act which would be a crime if accompanied by a certain intention or other state of mind, and not otherwise, was in fact accompanied by that intention or state of mind or not. See the illustration (2) and note.

In the very hard case of killing by a military subordinate being adjudged murder, which is alleged by Markby (§ 276, pp. 140, 141), Stephen (Dig. Art. 202, Ill. 1), appears to treat the decision as good law, but introduces a qualification, as to knowledge *of fact*, into his digest of our case-law on this subject.

[27] R. v. Esop, 7 Carrington and Payne, 446 (unnatural offence).

[28] A fair duel. Barronet's case, 1 Ellis and Blackburn, 4. See too 1. 1. Dearsly, C. C. R. 58.

[29] Campbell, C. J., in the last case. The judges all relied on this ground, though one *did* advert to the gravity of the offence.

been hitherto considered rather as an assumption of knowledge that certain conduct, or conduct leading to certain results, is in some way legally *punishable*. It is, however, in an important class of cases, usually put as a general knowledge that certain *acts are wrong*, which is evidently the view taken by Hale and Blackstone, on the exemption of infants and lunatics, when they speak of *discernment of good and evil*[30]. It is in this more extended view of the legal presumption in question that I come to consider the *third essential* to the offender's criminal liability and his third *ground of exemption from it*.

The *first* of these grounds was, it will be remembered, a *defect* of *volition*, or *power* of *will* properly so called, because the *primâ facie* agent either *did not know what he was doing* (in the strict sense of these words) or, *could not help it*. The *second*, where the agent *had volition* but *could not foresee* the (less immediate) consequences of his conduct. In this *third* and last case he *has* the *volition*, and *can foresee* the consequences, but **does not know** that his conduct, as leading to these consequences, is **punishable or wrong**. In defence of a *moral* distinction recognized in the latter alternative term, (to which I admit the natural objection of lawyers), I would first quote the unexceptionable testimony of Sir James Stephen in his remarks upon the meaning of the legal term *malice*. "It will be found in practice impossible to attach to the words *malice* and *malicious* any other meaning than that, which properly belongs to them, of *wickedness* and *wicked*[31]." Therefore "the presumption of *malice* is rebutted by proof that the person who did the act could not know that it was *wrong* or could not *help* doing it[32]." The words *could not help doing*

[30] Blackstone, Comm. 4. 2, p. 23. Hale, 1 P. C. 26, 27. Also the very able summary of Hale's views by the Solicitor-General in Lord Ferrers' case (19 Howell's State Trials, 947, 8).

[31] G. V. 82. [32] G. V. 91.

it can only apply to the cases where *volition* fails; and have nothing to do with the point at present under consideration. But I shall devote the rest of this chapter to a consideration of what is the effect of replacing the *Knowledge of Law*, generally presumed, by that question, frequently put in the most serious charges,—"*did he know it was* **wrong?**"

I must premise that we are only speaking of charges where the conduct is also, as a matter of fact, *legally punishable:* that which is *merely* wrong not coming under criminal law, or law at all. Also, that, in this use of *wrong*, moral and not necessarily *legal* wrong must be intended, or the substitution of this question "did he know it was *wrong?*" for "did he know it was *punishable* or *illegal?*" is unmeaning. The sense, therefore, which Austin gives to *wrong*[33], certainly so far as it implies the command of a political superior, and probably so far as it implies command at all, is misleading. Wrong, in the judges' question above quoted, is a term of *moral* disapprobation. What is the direct meaning, original or developed, of the word and its cognates in other languages, I need not here consider, for etymologists and moralists will both agree that such words at least *connote*, or carry together with their direct meaning, the idea of *general disapproval:* that, when a man knows his conduct to be *wrong*, he in ninety-nine cases out of a hundred knows it to be disapproved by those amongst whom he lives—by his nation or community, if not as a nation or community, yet as a number of individuals[34]. Just as "the system of morality tacitly referred to by the use of the word *malice* is that system or rather the aggregate of those moral sentiments which, as a fact, are generally entertained in the nation[35]."

[33] Austin, Lect. 18, pp. 421, 2.

[34] And the hundredth will not be, except in the abnormal case considered at the end of this chapter, very likely to offend against criminal law.

[35] Stephen, G. V. 90.

The case where an offender could *neither know* that his conduct was *wrong*, nor that it was *legally punishable*, will be obviously exempted from criminal liability under any but the most irrationally tyrannical government. This is possibly the case intended by the presumption *juris et de jure*, of *want of mischievous discretion* in **infants under 7**, and is no doubt the actual mental condition of many persons *permanently* or *completely* **deranged**, where a general incapacity to estimate either the morality or the punishability of their own conduct may be proved, very similar to the general incapacity considered in the last chapter.

In the case of older persons, sane or only *partially insane*, the agent might know that his conduct was wrong but not that it was legally punishable, or know that it was legally punishable but not that it was wrong, and our present enquiry is—if one knowledge or capacity of knowledge be wanting, is the other sufficient to constitute a crime?

When people state a particular thing to be wicked, says Sir James Stephen, they mean that it is in point of fact blamed, and *under certain circumstances is punished*[36]. I question whether the very significant addition, in the words here italicized, is so much an actual part *of*, as an almost necessary inference *from*, the popular idea of *wrongness*. But if a man has capacity to know that his conduct will be generally disapproved of by the community amongst whom he lives[37], he has certainly sufficient reasonable ground to put him on his enquiry whether the same conduct may not be regarded as *illegal* by the same community, as a whole: and, further, whether it may not, being so recognized, be the subject of penal or criminal prosecution. That is, if a man *knows that his conduct is wrong, and it*

[36] G. V. 82. [37] See above, p. 62.

is in fact punishable, he is reasonably presumed to know, that it is punishable also.

On this point the judges consulted in consequence of McNaghten's case answered[38]: "If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable—the usual course therefore has been to leave the question to the jury, whether the accused had a sufficient degree of reason to know that he was doing an act that was wrong." This is surely a reasonable rule and a proper question. It is not that, as Markby appears to object[39], the capacity of distinguishing right and wrong is set up as a general test of insanity. The point to be discovered is neither such a general test, nor even the insanity of the individual charged, but, whether that individual is reasonably to be held responsible. I have here taken the word *wrong* to have much the same general meaning as Sir James Stephen gives to *wicked*, and to depend upon the current morality of the time and place. To go farther, and define *wrong* by reference to *natural* or *divine* law, seems for legal purposes undesirable[40].

What is here stated of an *insane* agent is *a fortiori* true of a sane one. In the case of *infants* the different grounds of exemption are so much confused that I am obliged to put what little I have to say on their behalf all together at the end of this chapter.

The converse hypothesis to that already considered, where a man may *know his conduct to be illegal or punishable, but not know it to be wrong*, can scarcely apply to children or weak-minded persons. *This* needs a strong conviction that the conduct is *right;* the conviction of a patriot, a

[38] 10 Clark and Finnelly, 200. [39] § 250, p. 129.

[40] As Lord Lyndhurst does in R. v. Offord (5 Carrington and Payne, 168), "Committing an offence against the laws of God and nature."

fanatic or a madman. It may be that the standard of right and wrong to which he refers his conduct *is* the popular or general one; it may be that he has a standard of his own[41], differing from the popular one, and due to what he conceives to be a superior intuition or a supernatural revelation.

The first case is a matter of policy rather than of jurisprudence. The laws administered by a government may be entirely out of accord with the moral standard of the governed: but no one could say that the government is unreasonable or inconsistent in holding a man responsible for acts which he commits as the result of ordinary human motives, with a knowledge of the penal character of such acts, to counterbalance those motives.

Particular views as to morality, or what would generally be styled a *perversion of the moral sentiments*, though by some medico-legal writers dignified with the name of *moral insanity*, yet, if unaccompanied by delusion, constitute no exemption from criminal liability[42].

In the case of **delusions**, into which the supernatural enters, leading a man to believe that his conduct is *right* though *illegal*, Sir James Stephen appears to hold generally that such a person should not be punished[43]. So, in the original case of McNaghten, it was relied upon by L. C. J. Tindal, that "the prisoner could not be sensible that he was violating *both the laws of God and man*." This ruling was possibly one of the reasons why, the acquittal of McNaghten

[41] This standard, as to *wickedness*, is included by the words of Sir James Stephen, where he represents "the precise meaning of the proposition that an act is wicked" to be "that it is condemned by some system of morality which *the person* using the word *wicked* affirms to be true." (G. V. 89.) But, as he shews on the next page, it is only with the moral sentiments *generally* entertained in a nation that *law* has to do.

[42] See the excellent remarks in Taylor, pp. 692, 3.

[43] G. V. 91, 93, 94.

being considered unsatisfactory, the questions were put to the judges afterwards, which elicited what appears to me the more reasonable view, although the supernatural element is not so clearly introduced as it was in the trial of Hadfield, to be next mentioned. "In the case of partial delusions, notwithstanding the accused did the act with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of procuring some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew that at the time of committing such crime he was acting *contrary to law*, i.e. the law of the land[44]."

In Hadfield's case, an obligation which he believed to be supernatural was the motive which, not so much *overpowered* the natural effect of knowledge that his conduct was penal, as *co-operated* with that very knowledge to produce the conduct[45]. In the child murder cited by Sir James Stephen as a strong instance of iguorance that the conduct was *wrong*, and in the incendiarism of Jonathan Marten, a supposed immediate revelation from heaven was the cause of the criminal act[46]. In these, and similar cases, the impulse of a supposed supernatural revelation, running counter to a knowledge of the illegality or punishability of the agent's conduct, might be not unreasonably, as in certain cases of overpowered volition[47], treated as *irresistible*. Where the supposed supernatural element is wanting, the reason for

[44] M'Naghten's case, 10 Clark and Finnelly, 202, 209.

[45] Stephen, G. V. 94. This seems to me the result of Sir James Stephen's remarks on the case. As it appears in Russell (I. p. 120) and Collinson's Law of Lunatics (pp. 484—8), I scarcely see the connexion between the supposed supernatural appearances and the crime. Hadfield's condition, indeed, seems rather to have been one of general mania, at certain periods, than particular delusion.

[46] *ib.* 91, and Taylor, P. and P. 2, 572.

[47] Above, ch. III. On irresistible impulse, see Taylor 753, 4 and 764.

exemption is not so clear. A man who murders a child in the hope of being confined in a place where there are windmills[48], ought to be hanged if any person of impaired intellect is ever hanged at all. Here I may refer to the very strong considerations urged in the third chapter of Sir James Stephen's General View[49]. They are directed against the indiscriminate exemption of madmen for any crime whatever: still, they are not unsuitable to the case of a madman who *knows* an action to be *criminal* but *thinks* it to be *right*, except, as I have said, when the impulse to the action may be fairly called *irresistible*. "The great object of the criminal law is to induce people to control their impulses, and there is no reason why, if they can, they should not control insane impulses as well as sane ones[50]." *A fortiori* do such considerations apply to cases where there is *no* conviction of rightness or supernatural obligation, but merely the apparent absence of ordinary motives.

Of the greatest importance, too, is the caution given by the same author[51], that madness or sanity is, for legal purposes, a quality, *not* of the mind or body, to be classed in certain *genera* by physicians; but of the individual's *conduct*, to be settled by lawyers, according to the presence or absence of the essentials of criminal liability.

Criminal liability of infants. *Will, understanding, moral discernment,* and a *wicked* or *mischievous disposition* are so inextricably confused in Blackstone's account of the criminal liability of young persons[52], that one must agree on the whole with Austin's sweeping censures. On one point, perhaps, Blackstone is right in asserting, and Austin wrong

[48] Stephen, G. V. 94. Taylor, P. and P. 2, 574. The case is not repeated in the last edition of the Manual.

[49] G. V. p. 96. [50] *ib.* 95.

[51] Compare G. V. p. 87 and Digest Appendix, note 1, pp. 331, 2.

[52] Bl. Comm. 4. 2, 22—24.

in denying, that there may be an absence of *will* in very young children[53]. The presumption *juris et de jure* against liability for capital crimes[54] under seven, was a rough and ready method adopted when a great number of crimes were capital, which are not so now, doubtless from a natural reluctance to inflict the sentence[55].

Between the ages of seven and fourteen English law presumes infants *doli incapaces*[56], this however being only a *præsumptio juris*, rebuttable by proof that the infant had a power of *discernment between good and evil*. These words appear to indicate knowledge that the conduct was *wrong*. In two instances, however, mentioned by Hale, of *malice* or *doli capacitas*, in young children, the subsequent acts of the accused rather shewed that they knew their conduct to be *punishable*[57].

According to Sir James Stephen's digest of the present English law, no act done by any person over seven and under fourteen years of age is a crime, unless it be shewn affirmatively that such person has *sufficient capacity to know that the act was wrong*[58]. Whether he contemplates a difference between knowledge that an act is *morally wrong*, and *illegal, here*, is not clear: he does so in the case of insanity directly following[59]. The *code* combines "sufficient intelligence to *know*

[53] Austin, Lect. 26, p. 511.

[54] 1 Hale, P. C. 26, 27. Blackstone, Comm. 4. 2, p. 23. "*No act*," according to Stephen (Digest, Art. 25) "done by any person under seven years of age is a crime. The Code (§ 20) enacts that no one whose age does not exceed seven years shall be *convicted* of any *offence*.

[55] On which account Stephen seems to think the presumption *now* unnecessary. G. V. 86.

[56] Hale, 1 P. C. 25—27. Blackstone, Comm. 4. 2, pp. 23, 24.

[57] The cases are No. 30 of 12 Edw. III. (Liber assisarum) and No. 4 Hil. 3 Hen. VII.. (Reports des Cases). There is clear indication of the same knowledge in the case of William York, Foster (Report), pp. 70—72.

[58] Stephen, Digest, Art. 26.

[59] *ib.* Art. 27, note 5.

the nature and consequence of conduct and *to appreciate that it was wrong*[60]." And, as a matter of convenience, the two kinds of knowledge will probably continue to be taken together, in the case of infants.

This chapter may be concluded with a few notes upon Roman law on the subject of the exemption of young persons from criminal liability.

In Roman law the literal meaning of *infans* continually recurs, and somewhat obscures the legal definition of infancy as a period of life. *Inability to speak* was of course important to the *stipulation*, which must be *oral*[61]. Want of *intelligence*, as to civil acts in law, is the ground on which both the *infans* and *infanti proximus* are put on much the same level with the madman by Gaius[62]. And the acquisition of speech is distinctly disregarded by Arcadius and Honorius, who fix, for one civil purpose, the termination of infancy at seven[63]. This appears almost as a *general definition* a little later[64], though Theophilus in his Commentary on Justinian's Institutes, while mentioning seven or eight as the time when a child begins to speak, plainly makes the entry upon the age known as *next* to *infancy* depend upon the latter fact[65]. Blackstone's general statement that children under ten and a half were at Roman law not punishable for any crime[66] has no support in the passage quoted by him

[60] Code, § 21.

[61] Ulpian, Digest, 45. 1. 1. pr. Stipulatio non potest confici nisi utroque loquente: et ideo neque mutus neque surdus neque infans stipulationem contrahere possunt.

[62] Ga. 3. 106. Furiosus nullum negotinm gerere potest quia non intelligit quid agat (cf. Just. Instt. 3. 19. 9, 10). Ga. 3. 109. Infans et infanti proximus non multum a furioso differt quia nullum intellectum habent.

[63] Codex Theodosianus 8. 18. 8.

[64] In a constitution of Theodosius (2) and Valentinian A.D. 426. Infanti id est minori septem annis. Codex (Justiniani), 6. 30. 18 pr.

[65] Theophilus, 3. 19. 9.

[66] Blackstone, Comm. 4. 2, p. 22.

from the Institutes[67], a work confined almost exclusively to *civil* matters. The other references given by him, to the Digest, bear upon the civil liability for delict[68] and the criminal liability in general[69] of a person not arrived at puberty, if he is *culpæ* or *doli capax* or has *rei intellectus*. The cases apparently make out a *præsumptio juris* of general incapacity to commit *wrong*, public or private, under puberty; rebuttable by evidence of *capacity*, at any rate in the age called next to puberty, the limits of which are not very clearly settled. Puberty itself was fixed by Justinian at completion of the 14th year for males and the 12th for females[70].

[67] The passage quoted as Inst. 3. 20. 10 is now numbered 3. 19. 10.

[68] Dig. 50. 17. 111 pr. Pupillum qui proximus pubertati sit capacem esse et furandi et injuriae faciendae. Dig. 47. 2. 23. Impuberem furtum facere posse si jam doli capax sit Julianus...scripsit. Item posse cum impubere damni injuriae agi...in infantes id non cadere. See too Paul. Sent. 5. 4. 2.

[69] Dig. 29. 5. 14. Ejus aetatis, quamquam nondum puberis, ut rei intellectum capere possent, his non magis in caede domini quam in ulla alia causa parci oportere.

[70] Just. Instt. 1. 22. pr.

CHAPTER VI.

DEGREES OF CRIMINAL LIABILITY.

A. *Major Criminality.*

Intention.

THE list of the *essentials* of criminal liability is now concluded. They fall, as has been seen, into two groups. First; an *event*, which is '*criminal*' if a consequence of human conduct, and a *connexion*, not too remote, of that event with the conduct of some *person*—henceforth called the *offender*. These are respectively matters of particular municipal law, and evidence. Second; certain mental conditions or capacities of the offender, namely—*volition, knowledge of the consequences of his conduct*, and *knowledge that his conduct was wrong*. These last are recognized as essential to criminal liability, with more or less distinctness, in all civilized systems of justice. They are generally matters of *legal presumption*, to be rebutted by evidence, either that the offender belongs to a class in whose behalf a counter-presumption holds, or that one or more of the essentials is wanting in his particular case. If all the essentials are present, the offender must be in some degree criminally liable. The degree is often indicated by different names for the crime, where the resulting consequence which gave rise to the whole procedure is the same. And, not only here, but where there is one simple degree of criminality attached to a particular class of criminal

consequences, the crime has, in all serious cases, acquired a specific legal definition, the points of which must be substantively proved. These points often combine, with some of the essentials above described, other facts of the offender's consciousness. In other words the *corpus delicti*, or total of his offence[1], in most cases includes some matter of *motive* or *intention* not hitherto noticed[2].

Motives. I do not know that the term *motive* is very largely used in practical law: but as it is often used in treatises of jurisprudence and that sometimes in a lax and sometimes in a strict signification, I may here quote some useful dicta from the best authorities known to me on the subject.

Strictly, according to Austin[3] a *motive* is a desire causing and preceding a 'volition'—it is a wish for some object not to be attained like an act proper (i.e. bodily movement) by the mere wishing for it (a 'volition') but by means, *inter alia*, of volitions. There may obviously be *motives of motives*—the desire for a certain end will lead to the desire for the means to that end, and the latter to a volition[4]. In this case the desire for the *ultimate* end will generally be what is understood as *the* motive *par excellence;* though perhaps this is more strictly true of the ultimate end *for the time being*[5].

The above is the strict and proper sense of *motive*[6]: it is however often used *improperly* for the *end* or *object desired*[7],

[1] See Austin, Lect. 24, pp. 479, 80, for this phrase.

[2] For *specific intention* see the end of this chapter.

[3] Austin, Lect. 18, 19, pp. 428, 432. [4] *ib.*

[5] Markby, p. 101, § 207.

[6] Cf. the words of Bramwell, B., in R. v. Haynes. 1 Foster and Finlason, 666.

[7] How easily and naturally the term motive is transferred from a desire to the object of that desire, or even to the object of an aversion, may be seen from Austin's own expression "the sanction" (contingent evil) "cannot

in which case it generally means the ultimate end for the time being.

Intention. Passing, however, now from the *term* motive to the *thing*, I proceed to consider the *desires* or other mental condition, besides mere *capacity*, of a person to whom certain criminal consequences are in some degree imputable.

First, these consequences may have been *distinctly desired* by him, either as end or means. This case excludes the idea of *omission*, or not doing a thing because we never think about it. It obviously includes the *expectation* of the consequences of our conduct, or the knowledge that such consequences are likely to result from such conduct—and something more. If we wish for a result, and we act so as to produce that result, we *set ourselves* to produce that result by our conduct. And this I cannot but believe to be the original meaning of *Intentio:—the setting* (literally *aiming*) *of oneself and one's powers to bring about a certain result*[8].

The meaning of *intention* in French[9], from which language I suppose we received the word, of *intent* in the language of our old common law[10], and of *intention* in its ordinary modern English use, is pretty nearly equivalent to

operates as a motive," p. 505, and Bentham's very confused and loose chapter "Of Motives" (Introduction, ch. x.).

[8] I put together a few instances:—

(1) mere *aim* or direction: proficisci quo te dicis intendere. Cicero de Orat. 2. 42. 179;

hence (2) *attack:* intentio ac depulsio (in suits). Quinctilian, Inst. 3. 9. 11;

or (3) *design, purpose:* intentio tua ut libertatem revoces. Pliny, Panegyr. 78;

(4) *intentio* as part of the formula: qua actor desiderium suum concludit. Gaius, 4. 41. This appears to include both (2) and (3).

This last is the commonest meaning in the Digest, passing sometimes into that of simple assertion or allegation; e.g. Digest, 8. 33. 1.

[9] From Joinville downwards. See Littré.

[10] Stephen (G. V. 305) calls *intent* the end contemplated at the moment of action. Is it not rather the contemplation of the end?

design, purpose, and perfectly consistent with the original idea of *setting oneself* to attain a certain result. Such an intention may obviously be true either with reference to *present* or *future conduct:* the only difference being that the intention is sometimes *hasty,* sometimes *deliberate.*

Austin's Intention. I must now consider in some detail the narrow sense given by Austin to the word *intention*—by which he certainly sometimes means merely strong expectation—because it is an important divergence from the ordinary meaning of the word, and it is undoubtedly of weight and effect with many juristic authorities.

1. With regard to a *present* act.

The *act* itself—in a strict sense—i.e. the bodily movement, is, we are told, *intended* because it is *expected*[11]. Surely the expectation that an 'act' will follow a 'volition' is scarcely ever consciously entertained? If not, it is an invention as gratuitous as *The Will,* according to Austin's view of the latter[12].

As to the *consequences* of a present act: to *expect* any of its consequences is to *intend* them[13]. It does not follow that they are *desired,* as they may be *intended* without being desired[14], with the exception of the present pleasure or satisfaction from the act[15], which must be both *intended* (expected) and desired[16].

Here, I think, a distinction must be drawn between some of the consequences of a present act and others.

There are, as I have shewn above[17], certain immediate consequences of bodily movement, popularly coupled with it under the name of *act,* and sometimes said to be *willed,* as to which there would be, with most people, the strongest presumption, (only rebutted by a counter-presumption from very

[11] Austin, Lect. 19, p. 434.
[12] See above, ch. III. p. 26.
[13] Austin, Lect. 19, p. 433.
[14] *ib.* 434.
[15] *ib.* 435.
[16] *id.* Lect. 21, p. 449.
[17] Chapter III. pp. 23, 24.

early age or by proof of weakness of mind or extraordinary inexperience), that they were both expected and wished to happen. Such consequences, therefore, are in all cases but the exceptional ones just indicated, assumed to be intended in the *popular* sense, as well as in that of Austin, and in the modified Austinian sense which I take Sir James Stephen to attach to the word. Accordingly, as there are very few bodily movements known as actions or acts, which do not carry with them some of these immediate consequences, the statement of the last-named author, that intention is essential to an action[18] is *generally* true.

As to more remote consequences, the presumption does not arise with equal strength, that they were expected at all, or, if expected, were also wished. It is of these remote consequences that Austin is speaking when he says that they may not be intended[19], and may be intended but not wished[20], of which last case he gives a strong illustration, meant for a future act, but applicable to a present one as well[21], where the intending agent "*intends a consequence from which he is averse*[22]."

2. Intention as to a *future* act.

But the strongest statement of Austin's *intention* is what he says about it with regard to a *future* act. Here, we desire certain consequences, we believe that they are attainable through our conduct, we believe that we shall do acts in the future for the purpose of attaining those consequences[23]: and this is, according to our author, *all*. "A present intention to

[18] G. V. 81. [19] Austin, Lect. 19, p. 434. [20] *ib.* 435.

[21] *id.* Lect. 21, p. 453. "I intend to shoot at and kill you...but knowing that you are always accompanied by friends...I believe that I may kill or wound one of these in my intended attempt to kill you." Translated into the present tense and into real life; Orsini, at the moment of his attempt, *intends* to kill the republican individuals who are as sure to be in the street about the Emperor, as the Emperor's friends to be about him. *Itane vero?*

[22] *ib.* [23] Austin, Lect. 21, p. 449.

do a future act is nothing but a present belief that we shall do an act in the future[24]." Such expressions as "that we have *resolved* or *determined* on an act" only mean "that we have examined the object of the desire and have considered the means of attaining it, and that, since we think the object worthy of pursuit, we believe we shall resort to the means which will give us a chance of getting it[25]." Consistently with the above views, Austin holds that *forbearances* are *intended* but not *willed*[26], by which he means that, in a forbearance, there must necessarily be a *contemplation* of consequences which are to be prevented, though he cannot admit, according to his view of *volition*, that *anything is willed*[27]. And, in protesting against Bentham's confusion of Will and Intention (which is certainly very inconvenient) he tells us that, *though will implies intention, intention does not imply will.* Of which aphorism, and the passage wherein it is imbedded, I have attempted a translation in a note[28], for the benefit of those who may be puzzled with it, as I have been myself.

Austin adds several expressions used in juristic language —the *intention* of *legislators*—of *testators*—of *parties to a contract*—and endeavours to shew how each may be reduced to one of the notions—present volition and act with expectation of a consequence, or present belief that one will do an act in the future[29]. In the last case, his note materially varies

[24] *ib.* p. 451.

[25] *ib.*

[26] *id.* Lect. 19, pp. 437, 8.

[27] Above, chapter III. p. 42.

[28] Austin, Lect. 19, p. 434. "Will implies intention (or, the appropriate objects of volitions are intended as well as willed)," *i.e.* the primary bodily movements which are the objects of, and immediately follow, volitions, are not only willed, but also intended, *i.e.* expected (see above, p. 74). "Intention does not imply will: or, the appropriate objects of *certain* intentions are not the appropriate objects of volitions." These *certain* intentions are *all* intentions, except the intentions (expectations) of primary bodily movements. The next words—"The agent may not intend a consequence of his act"—belong to a new subject and should begin a new paragraph.

[29] Austin, Lect. 21, pp. 455, 6.

from his text, containing the truer view that the intention of contracting parties is that of both the promiser and promisee jointly. In all three his explanation is filled with unnecessary difficulties, from his resolution to substitute, for the meaning 'purpose or object,' that of mere expectation[30].

Some writers of eminence directly follow Austin in his meaning of *intention*[31]: with others[32] that meaning is apparently coloured by reference to the derivation of the word: with others[33] by some consideration also of its popular meaning. The last contribution to the subject is obviously the most important for the purposes of the present work. Intention is, according to Sir James Stephen[34], "stretching towards" fixing the mind upon the act and thinking of it as one which will be performed when the time comes." These words apply more properly to deliberate than to hasty intention but are evidently, from what he says afterwards[35], meant for both. Again:—"Intention is the contemplation by the mind of the one common result to which many combined movements are directed[36]." And as most so-called actions will be such "common results"—not simple bodily movements, or mere combinations of simple bodily movements: as, in fact, some of the immediate consequences of an act proper (in Austin's sense) are in almost all cases connected, in popular belief and language, with it: intention *is*, generally speaking, an element of action[37].

[30] Apart from the question, *whose* intention is meant by 'the intention of contracting parties,' the expression is a somewhat difficult one. It seems to me to have *first* indicated the *purpose* or *object* of the parties in making the contract; *then*, the meaning of the words, as used by them, in which they endeavoured to express that purpose.

[31] e.g. Markby, § 214, p. 105.

[32] e.g. Poste, Gaius, p. 13.

[33] e.g. as I think, Sir James Stephen.

[34] G. V. p. 77.

[35] *ib.* p. 78. This process...may be compressed into an infinitesimally small space of time.

[36] G. V. pp. 77, 8.

[37] *ib.* 81, and above, p. 75.

In this last account of intention, the author does not appear to me to make it perfectly clear when he is speaking of *primary* actions or *primary* results; and when, of the results or consequences which are *ultimately* desired or contemplated. He also does appear to be giving rather a meaning of *at*-tentio "fixing the mind *upon* an object"—a meaning which is, I am aware, borne by *intendere* also—than the special meaning of *in*tentio, "aiming or directing one's powers *at* a certain result." Consequently, though certainly more correct than Austin, who omits or does not state with any clearness the *fixing* the mind *upon* the act, he understates the original derivational sense of the word as well as that in which it is now popularly used.

If, as would seem desirable in a practical matter like criminal law, we are to go by the general modern meaning of *intention*, we must absolutely discard Austin's use of the word as being too wide with regard to the objects of expectation which it includes—too narrow with regard to the feelings of the mind which it denotes.

Does any one, in ordinary life, ever speak of 'intending' a consequence from which he is averse? Does any one, in ordinary life, ever mean by 'intention,' expectation without desire?

Austin's was, probably, an attempt to include under the one term 'intention' conduct where intention really exists and conduct which may be reasonably considered equally criminal as if *intention* existed. I refer, in the latter instance, mainly to the cases where the legal construction or presumption of *malice* has been employed—the chief principle of which cases appears to be, that *the natural consequences of a man's act* (including *forbearance*) *are to be imputed to him.* For the expulsion of this confused and misleading term malice I hope to shew some reason in the next chapter: but the principle of my objection to

that word applies with equal strength in the case of Austin's *intention.*

If the different states of criminal consciousness can be designated by different terms, there can be no benefit in confusing them by the misuse of a word clearly enough understood in ordinary parlance. Austin, himself, in fact, in the brief but very valuable notes on Criminal Law[38], reverts to the natural meaning of intention, when he recognizes a subdivision of criminal knowledge into criminal *design* [intent or purpose] and criminal knowledge short of criminal design. The first is "where the production of the mischievous consequence which the law seeks to prevent is an *end* (or object) ultimate or mediate of the criminal; and where, therefore, the criminal *wishes* (or *wills*) the production of it[39]." Of the second I shall treat presently.

On the subject of intention in general, enough has been said: but a few words must be added, first, on intention with reference to a future act; in other words, *deliberate* as opposed to *hasty* intention; second, on what Sir James Stephen terms *specific intention.*

With regard to the feelings of the mind in *deliberate intention*, we do, I believe, whether rightly or wrongly, include in our idea of it, not only expectation and desire, but even something else.

Where a desire of consequences, believed by us to be attainable through our conduct, takes the form of *intention, resolution* or *determination;* is it not an incorrect use of language to talk of *believing*[40] that we shall act in the necessary manner? If this is a *belief*, it is one like the American's *believing* he will take a cup of coffee, so different from other beliefs that it ought to have a distinctive name.

[38] Austin, Notes on Criminal Law, p. 1093 (of the Jurisprudence).
[39] *ib.*
[40] Austin, above, notes 23, 24, 25.

It is true, as Austin says, that even "resolutions" and "determinations" are not *conclusive of the will* but are *ambulatory* or *revocable*[41]: but I believe that when we use these terms, (and even when we speak generally of *intention* to do a future act,) a certain *bent* given to the mind, a certain weakening of the mental power to forbear when the time arrives, is rightly connected by us with the particular form of desire and expectation. In a morbid state of mind, this weakening of power to forbear may go so far that the *bent* may be *inflexible*, or the *propensity*, to put the matter in another way, *uncontrollable*—as in the suggested defence of Dove[42]. But this extreme case appears to be only different in degree, not in kind, from *any* determinate and deliberate *intention*.

In the case of intention with reference to a *present act*, there is not *time* (if one may permissibly apply the language of the external world to the operations of the mind), for this *bent* of the mind to be formed: but there remain the elements of expectation and desire. The latter is the criterion of difference between the hastiest *intention* and the most deliberate *criminal knowledge*. In heinousness or danger to the community, the latter frame of mind may doubtless be often worse than the former; but it certainly seems both more intelligible and expedient to class all real intention together, recognizing hastiness, with provocation and other matter of excuse, rather as extenuating the first, than constituting a second degree of criminality.

Specific intention. Sir James Stephen lays it down that for any action to be a crime it must not only be *intentional*, in the general sense which he explains as above stated[43], but must also be accompanied by *a specific intention* forbidden by

[41] Austin, Lect. 21, pp. 451, 2.

[42] See Sir James Stephen's very valuable remarks, G. V. 401,

[43] Above, notes 34—37.

the law in that particular case[44]. And Austin, consistently with his view of the order of things, makes abstinence, from a set of such specific intentions coupled with certain actions, into a set of *original legal duties*[45].

It is undoubtedly the case that, with most crimes, some special statement of the intention of the offender has become part of a legal definition of the crime. In what we English call *common law*, this evidently arises from the fact that judges must sooner or later find it unjust or inexpedient to place all people, who produce the same *primâ facie* criminal result, on the same footing, even though they may have *intended* it not only in Austin's, but also in the ordinary sense of the word. That is, it is found that certain consequences, *primâ facie* injurious to society, may be intentionally produced, from an ultimate motive to which no criminality at all or only a minor degree of criminality can be attached. Hence the *animus furandi* required in *larceny*[46], the *felonious intent* in *burglary*[47], the *malicious wilfulness* in *arson*[48]. Later, the *intent to defraud* in forgery[49], and the numerous cases of crime by statute[50] where some special form of intention enters into the enacted definition.

In the dictum, however, that *specific intention* is essential to *every* criminal action, I cannot but think that the word *specific* is employed in an unusual sense, if we find that the specific intention "is more frequently denoted by the

[44] G. V. 81.

[45] Austin, 24, p. 479. It is, by the way, perfectly clear that *intention* is here used in the *ordinary* sense.

[46] Blackstone, Comm. 4. 17, p. 232, n. 5. In Roman law, liability to the *civil obligation* of *furtum* is constituted by mere knowledge of the owner's non-consent, which is somewhat improperly called *affectus furandi*. Just. Instt. 4. 1. 6—8.

[47] *id.* 4. 16. 227. [48] *id.* 4. 16, pp. 220, 222.

[49] Blackstone, 4. 17, p. 248. Cf. Stephen, Digest, Art. 267.

[50] *e.g.* wounding with intent, &c. See Stephen, G. V. 81.

general term *malice*[51]." For that most unsatisfactory of all legal expressions extends to intention so general and vague that in some cases it is doubtful whether we can retain the word at all with any propriety, and should not rather substitute *knowledge*. *Malice*, however, is of sufficient interest and difficulty to require independent consideration.

[51] *ib.* 81.

CHAPTER VII.

DEGREES OF CRIMINAL LIABILITY, CONTINUED.

A. *Major Criminality.*

Malice.

AUSTIN is sometimes quoted as an authority for the statement that the English legal term **Malice** simply denotes *intention*. Although, however, one passage[1] rather gives colour to this view, it is not a fair one to the author, who points out, in a very good note[2], that the term has been extended 'abusively' to negligence (or criminal inattention), and to criminal knowledge short of criminal design. With Austin's *objection* to the use of the term few will disagree.

All attempts at giving a clear and uniform meaning to this word *malice*, as used in English law, appear to fail. It may, however, be of some use to trace down, in historical order, so far as that is possible, its principal usages, to shew what essentials or degrees of criminality they indicate, and by what clearer expressions they might possibly be replaced.

Malitia, with the Roman jurists, occurs, like most of their terms which have descended to us, mainly in connexion with *civil* cases. Avoiding the name, which has become technical, and therefore artificial, of *fraud*, I should

[1] Austin, Lect. 12, p. 355.

[2] Notes on Criminal Law, p. 1093 (of Jurisprudence).

translate *malitia* almost everywhere where it occurs independently, in the Code or Digest, by *trick* or *trickery*. Such is clearly the sense in which a minor's *malitia* "makes up for his want of age[3]." This well-known maxim, due in the first instance to the emperors Diocletian and Maximian, has been applied by our English jurists to *criminal* law, as expressing the doctrine that a proved individual capacity of doing ill or contracting guilt will remove the *primâ facie* non-liability of an infant for criminal actions[4].

Where *malitia* is opposed to *error*, in one of the few passages bearing upon criminal or penal cases in which we find the word, it may be rendered unlawful design as intention[5]. And in several instances *malitia* is used as directly equivalent to *dolus*[6]. It is not, however, my intention to enter into an examination of the latter word (*dolus*) here. Suffice to say that *dolus* is of course short for *dolus malus*[7], and on the whole means *direct evil intention*, *dolus indirectus* being a purely modern phrase and idea[8].

One important meaning of the classical *malitia* yet

[3] Dig. 44. 4. 4. 26. Julianus...scripsit doli pupillos qui prope pubertatem sunt capaces esse. Quid enim si debitor ex delegatu pupilli pecuniam creditori eius solvit? fingendus est, inquit, pubes esse, ne propter malitiae ignorantiam bis eandem pecuniam consequatur. Cod. 2. 43. 3. Si, alterius circumveniendi causa, minor aetate majorem te probare aspectu laboraveris, cum malitia suppleat aetatem, restitutionis auxilium...denegari statutum est. See also siglorum malitias, Cod. 1. 17. 2. 22, by the side of siglorum captiones. *id.* 1. 17. 1. 13.

[4] 1 Hale, P. C. 26, quoting Fitz-Herbert's Reporte Corone, 118. The original is No. 30 Trin: 12 Edw. III.

[5] Codex 9. 23. 5. Sed secutus tenorem indulgentiae meae poenam legis Corneliae tibi remitto, in quam credo te magis errore quam malitia incidisse.

[6] Digest, 44. 4. 4. 26 (note 3). Cf. 44. 4. 4. 1, 3.

[7] The general signification of *calliditas*, covering also *dolus bonus* or 'pious fraud,' with which we have nothing to do. See Austin, pp. 480, 1 and 445.

[8] Austin, ll. cc.

remains. The plural, at least, is used in the evident sense of *spite*[9], the sense most often attached to the word in modern times. It is to the introduction of the word *malice*, in this last meaning, into the definition of *murder*—and subsequent recurrence to the derivation from *malus*, which arose from the necessity of extending that meaning, in that definition—that the inextricable confusions of our English *malice* are mainly due.

Malice in murder. Homicide is left by Glanville, as he very well might leave it, without definition: **murder** is, with him, merely *clandestine homicide*[10]; the name and the special procedure being possibly due to the times when a subject people resorted to *assassination* of their alien oppressors[11].

Bracton follows Glanville as to the special characteristic of *murder*, making it, however, a subdivision of such homicide as is *voluntary*, distinguished from that which is in the course of *justice*, by *necessity*, or by *accident*[12]. Homicide is according to him *voluntary*, if it is committed of certain knowledge, in a premeditated assault, from anger or hatred, or for the sake of gain, wickedly and feloniously, and against the king's peace[13]. If we compare this with another defini-

[9] Dig. 6. 1. 38. Neque malitiis indulgendum est, si tectorium puta, quod induxeris, picturasque corradere velis, nihil laturus nisi ut officias.

[10] De Legibus, &c. 14. 3. Duo autem sunt genera homicidii: unum est quod dicitur murdrum, quod, nullo vidente, nullo sciente, clam perpetratur, praeter solum interfectorem et ejus complices, &c.

[11] Leges Edw. Conf. 1. 15, 16 (Thorpe, pp. 448, 9) for reference to Canute. For the previous existence of an equivalent *morth-daed* see Athelstan 1. 6 (*id.* p. 203). For application to the Normans, Bracton 3. 15. fol. 134.

[12] Bracton, 3. 4. fol. 121. Voluntate...justitia...necessitate...casu. This chapter is the evident original of Blackstone's on homicide, the subdivision of Bracton's homicide *facto* being clearly identifiable with those of homicide generally by the later jurist.

[13] *ib.* Voluntate, si quis ex certa scientia et in assultu praemeditato ira vel odio vel causa lucri nequiter et in felonia et contra pacem domini regis aliquem interfecerit.

tion of unjustifiable homicide by the same author[14], we shall probably conclude that his *wickedly* here means *with the intention of killing*[15].

Fleta, writing under Edward the First[16], distinguishes accidental homicide from that which is *nequiter perpetratum*, by the absence of intention to kill, and contrasts accidents with *malitiae*, which appear to mean evil or criminal designs generally[17]. In a well-known statute of the same reign, occurs the phrase *per malitiam*[18], which might perfectly well mean *out of spite* (against individuals), but is also capable of the more general meaning *of evil or criminal intent.* The latter is the view taken by Coke[19] and Hawkins[20], who practically render the phrase, "without just cause."

Of our quaint common law term for *deliberateness* of intention, the first use that I can find is in the wilful *prepensed* murders mentioned in a statute of Henry the Seventh[21]. *Malice prepense*, "malice forethought, prepensed," *malitia praecogitata*, as it is explained by Coke[22], first appears by name as a recognized essential to murder in the reign of Henry the Eighth[23]. If, then, we consider the

[14] *id.* 3. 36, fol. 155. Non jure occiditur quis ut si in assultu praemeditato et in felonia et animo occidendi fuerit quis interfectus ob iram et cupiditatem.

[15] In arson Bracton explains *nequiter* generally by *malâ conscientiâ.* 3. 27. fol. 147.

[16] Selden ad Fletam, cap. x.

[17] Fleta l. 31. Homicidium...casuale quod non est nequiter perpetratum...in istis casibus...non debet reputari felonia eo quod occidendi animo praemissa facta non fuerint, in malitiis autem spectari debet voluntas et non exitus.

[18] The statute of Westminster the second. 13 Edw. I. c. 12. Quia multi per malitiam volentes alios gravare procurant falsa appella fieri, &c.

[19] Instt. 2, p. 384.

[20] P. C. ch. 23 § 140, p. 198.

[21] 12 Hen. VII. c. 7.

[22] Instt. 3. 7, p. 51.

[23] 4 Hen. VIII. c. 2. See too Stanforde, Plees del Corone, 1. c. 10, and Lambarde Eiren. 2. 7, p. 237.

historical precursors of this phrase, we must admit the possibility that it may have been originally intended to cover *all* cases of deliberate design or resolution of an evil, *i.e.* unlawful character—not merely preconceived spite or grudge against the deceased in particular[24]. This more extended signification of *malitia* is necessary for the statutory use of the same word, in the same reign of Henry the Eighth, "mute of malice or froward mind[25]," *i.e.* "wilfully and perversely[26]." But that Coke took malice, in murder, to mean grudge or spite is perfectly clear from a passage immediately following his definition, in which he speaks of there having been malice between two, after which they are pacified and made friends[27].

The *narrowing of malice* (the word being supposed to have had originally a wider signification) to this popular meaning of *spite;* and the requirement of *deliberate preconception* in the *intention* essential to murder, had two results. First, a distinction between malice *expressed by the party* and malice *implied by law*[28] (*either* being held sufficient to constitute *malice prepense*): second, such an interpretation of *malice implied by law*, as would take in the original and wider signification of malice generally.

Thus we find it, on the one hand, clearly laid down that malice prepense is a *deliberate* intention of doing some corporeal harm to the person of another[29], by that other being intended the person actually killed[30].

On the other hand, the hastiest intention will suffice for

[24] See Blackstone, Comm. 4. 14, p. 198.

[25] 25 Hen. VIII. c. 3, § 2.

[26] See Hale, 1 P. C. 4. 34, note *o*; and 2 P. C. c. 43.

[27] Instt. 3. 7, p. 51. [28] *ib.* p. 47.

[29] Hale, 1. P. C. c. 36, p. 451, following Coke, who explains (Instt. 3. 7, p. 51) that the "compassing" must be done "sedato animo."

[30] Compare Coke's definition of murder (p. 47) and of *malice prepensed* (p. 51).

malice (or rather malice prepense) to be implied, if there is an absence of considerable provocation and the killing be intentional[31]; and the still wider doctrine that *all* homicide is presumed to be malicious, except certain specified justification, alleviation or excuse be proved[32], logically renders any enquiry into *personal grudge* perfectly unnecessary; the only question being—was or was not the killing done under any of the excepted circumstances? "The general result...is to throw upon persons who commit acts of a particular class the burden of proving that they were not done under the circumstances contemplated by the legislature, but at the same time to permit them to give evidence to that effect[33]."

Again, as to the *direction* of the spite or grudge, the convenient maxim, *malitia egreditur personam*, brings in the case where the mischief intended against one individual falls upon another[34]. The principle of this maxim is thus stated in far the best of the old text-writers, Sir Michael Foster. "Where the injury intended against *A* proceeded from a wicked, murderous or mischievous motive, the party is answerable for all the consequence of his action, though it had not its effect upon the person whom he intended to destroy[35]." More widely still, he puts it that malice aforethought is not to be taken in the restricted sense, a principle

[31] Blackstone, Comm. 4. 14, 200. Coke, Instt. 3. 7. 52. Coke's second and third heads, "in respect of the person slain," and "in respect of the person killing" seem merely to negative the excuse of provocation in the cases described.

[32] Blackstone, Comm. 4. 14, 201. See Foster, Disc. 2, p. 255, and Best, J., in R. v. Harvey, 2 Barnewall and Creswell, 268.

[33] Stephen, G. V. p. 83. I should venture rather to read "that they *were* done under certain recognized exceptional circumstances."

[34] Foster, Disc. 2, p. 262, following a quotation—si quis unum percusserit cum alium percutere vellet in felonia tenetur—by Coke (3 Instt. 7. 51) from Bracton (3. 36. fol. 155).

[35] *ib.*

of malevolence to particulars, not to be confined to the expressions of "the old writers, irâ vel odio vel causa lucri," but to be extended to *any other wicked* or *mischievous intention*[36]. And he adds: "most of the cases of implied malice...turn on this single point, that the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent upon mischief[37]."

By such *extension* of the word malice, if it first meant *spite*, or by such return to the original meaning, if it first meant *general evil design*, the phrase *malitia præcogitata* was easily made to cover cases where death was not intended, provided a mischief of a dangerous character *was* intended, and even though there might be no grudge against any particular person. It is, then, only one step further to an involuntary killing, in consequence of a voluntary unlawful act, which in its consequences *naturally tended* to bloodshed[38], or the voluntary doing of a *lawful* act in an *unlawful* and *extremely dangerous manner*—this last case being helped out by the curious doctrine of *malice* (in the sense of *spite*) *against all mankind*[39].

Finally, in the extremely hard case where an *unintentional* killing, in the prosecution of an *unlawful* though *not necessarily dangerous intent*, was held to be *murder*, this doctrine of the required malice being satisfied by *any unlawful intention*, is pushed to the extremity[40]. According to Foster, as we have seen above, the *intent* must be *criminal* in the *higher degree, i.e.* felonious[41].

[36] *id.* 256, 257. [37] *id.* 257.

[38] Blackstone, Comm. 4. 14, p. 193.

[39] *ib.* p. 192. This is more obviously true of a resolution, not, one would think, very common among civilized people, to kill the first man you meet. *ib.* 200.

[40] Coke, Instt. 3. 56. He does not here mention malice.

[41] Foster, 258, followed by Blackstone, 4. 193. A comparison with p. 201

On the treatment of *implied* or *presumed malice*, in murder, which has mainly resulted from the endeavour of this great jurist to *rationalize*, as Sir James Stephen puts it, the crude dicta of his predecessors, I venture to make two remarks. (1) The presumption in question does not, in strictness, alter the meaning of *malice*, as conceived by those who made the presumption. It merely says that, in certain cases, the offender shall be *treated as if malice existed*, without proof, whether proof to the contrary be admitted or not. If malice in murder meant originally *spite against an individual*, the presumption is generally reasonable, sometimes unreasonable but expedient. (2) The same presumption, and also the extension of *malice* from the narrowed meaning above indicated, to the possibly original and certainly wider one, are both, as it seems to me, attempts, in our piecemeal fashion, to introduce into recognition the general and just principle, that *the criminal consequences naturally resulting from a man's conduct shall be imputed to him.*

The exceptional rule by which consequences *not naturally resulting* from an offender's criminal conduct, or which could not reasonably have been expected by him, was also attributed to him, would scarcely, I submit, be maintained, in its full rigour, at the present day.

Malice in other crimes. I proceed briefly to consider other cases where the words *malice* or *malicious* are used in our law.

Arson is, by common law, the *malicious and wilful* or *voluntary* burning of another's house. It must, says Blackstone, be *malicious*...and therefore no *negligence or mischance* amounts to it[42]. This reasoning, which, it will be seen, makes malicious and voluntary tautological, is based upon

shews, I think, that Blackstone considered this a case of presumed malice. See also Hale, 1 P. C. 465, and above, p. 53, notes 27, 28.

[42] Blackstone, Comm. 4. 16, 222.

a misapprehension of Coke[43]. Malice here, however, evidently means, not merely *intention* (or *will* in Blackstone's language), but intention *to injure*, or a general evil and mischievous intention[44]. In fact, Hale defines the *malice making up for age* in the boy under 14, tried by himself for this crime, to have been *knowledge that it was evil*[45]. The Latin words ([43]) are the same as in the definition of murder. The substitution of "*unlawfully* and maliciously" in the statutory definition of arson[46], does not necessarily shew that the framers of the statute considered *malice* to be mere *intention;* because *unlawfully* may stand for the *feloniously*, and *maliciously* for the *wilfully and maliciously* of the old definition: but it does not add to the clearness of the legal conception of malice[47].

Malicious mischief. The intention to do injury or mischief is, I think, still the meaning of the *malice* required in the statutes against *malicious mischief*[48]—which, Blackstone says, is done "out of a spirit of wanton cruelty or black and diabolical revenge[49]." At any rate we have sufficient cases, as to the *person against whom* the *malice* must be entertained, to put the original meaning of malice in this case beyond doubt. The necessary result, of malice being taken in this strict sense of *grudge*, follows, in the rule that proof of *expression* is not necessary, malice being *presumed* until the contrary

[43] Coke, Instt. 3. c. 15, p. 67. *Maliciously and voluntarily.* Proved also by the words of the Indictment, which be, Voluntarie ex malitia sua praecogitata et felonice. For if it be done by mischance or negligence it is no felony, as before appeareth.

[44] See Farrington's case, Russell and Ryan, 207.

[45] Hale, 1 P. C. 569.

[46] 24 and 25 Vic. 97, § 1, &c.

[47] The Code substitutes the simple "wilfully" (§ 382), after a preliminary clause excluding cases of legal justification or excuse (§ 381).

[48] See, however, Stephen, G. V. p. 84.

[49] Blackstone, Comm. 4. 17, p. 244.

appears[50]. A clause in the Consolidation Act[51] provides "that every punishment, &c. applies whether the offence shall be committed *from malice conceived against the owner of the property or otherwise;* and the ultimate meaning of *maliciously,* left by the statute, clearly is *with the intent to do mischief* (*i.e.* injury) *to some one*[52]."

Libel. In *libel,* as an indictable offence, *malice* occurs again. Libel is a *malicious defamation*[53], and I think there is little doubt that *malice* here originally meant *a design to injure,* which is still the meaning of the statutory phrase *actual malice*[54]. But, in the enormously increased opportunities for publication of modern times, it became obviously necessary that communications should sometimes be criminally prosecutable, which were made *bonâ fide,* in the belief that it was a duty to make them, with no "desire for revenge," and "settled anger," in fine no desire to injure at all[55].

As, then, in *murder,* the *deliberate preconceived grudge* which had become part of the definition, was *presumed* in cases where it clearly did not exist, unless—not that presumption could be disproved, but certain justifying or excusing circumstances could be proved—so here, the indictment being necessarily for *malicious* defamation, the *malice* was *presumed,* unless—not the grudge was disproved—but

[50] *ib.* p. 246, n. 49.

[51] 7 & 8 Geo. IV. c. 30, repeated in 24 & 25 Vic. c. 97, § 57.

[52] This intent would undoubtedly be *presumed,* though the presumption might be rebutted by the plea suggested in Stephen, G. V. p. 84. I am here merely concerned with the meaning of *malice.* In the Code (§ 381, &c.) "malice" is wisely ejected from the subject of "mischief."

[53] Blackstone, Comm. 4. 11, 150 (*a*), quoting Hawkins, 1 P. C. 193.

[54] 6 & 7 Vic. c. 96, § 2. This is however the case of a civil action, not an indictment. *Malice,* simply, bears the above mentioned meaning in Hawkins (Of Libels), 1 P. C. 196.

[55] Markby, § 227, p. 111.

something else was *proved, i.e.* just cause for the publication[56]. This presumption of malice being evidently often contrary to fact, *the doing the act without just cause* has itself been called *malice in law*[57], and we come at last to the startling general definition of Bayley, J.[58]: "*Malice,* in its legal sense, denotes *a wrongful act done intentionally without just cause* or excuse."

It only now remains for me to say a few words on malice generally, and the expediency or inexpediency of retaining this term in law. I take actual and presumed malice together, treating the latter (after Foster) in its upshot or practical result, though, as I have intimated above, those who devised the doctrine did not apparently intend to alter the meaning of the word malice.

Legal malice, then, in its practical result, always involves *intention; if* the presumption hold that a man *intends the natural consequences of his conduct.* This presumption, however, which is necessary to bring in *wanton dangerous conduct* and *libel,* is perfectly reasonable, and may be, I venture to think, considered as established law.

Being *intentional,* malice is not predicable of an *omission,* unless that term be retained, as it probably may be, in the *laxer* sense.

As to the *object* of the *intention* (including the presumed intention just referred to), it is very difficult to lay down any

[56] Stephen, Digest, Art. 271. The publication of a libel (see Artt. 267—270) is malicious in every case which does not fall within the provisions of some one or more of the six articles next following. See note I, p. 187. The next six articles sum up the different states of fact which have been held to constitute "just cause or excuse" for publishing libels.

[57] The best illustrations, which I can find, are, I must admit, from *civil actions.* But the judges speak of the *general legal sense* of malice, and continually refer to criminal proceedings for the same use of the word.

[58] Bromage v. Prosser, 4 Barnewall and Cresswell, 255. See also 10 B. & C. 272.

general rule. The *absence of legal justification* appears to be essential, and therefore we may perhaps say that what is intended, must be what the party knew or might have known to be wrong. Sir James Stephen treats this as knowledge that the conduct is *wicked*[59]. That rendering exactly represents the language of our old jurists[60], whose theological bent must not be forgotten. I question whether it comes so near the result of later decisions as the word *wrong*. I have spoken above of *wrongness* and the legal presumption of knowledge concerning it[61]. If malice means nothing more than this, that presumption would render the use of the term unnecessary, and we might always replace *maliciously* by *wilfully* or *intentionally*.

There is, however, undoubtedly the vague feeling, both in text-writers, judges and juries, that *malice*, except when qualified by some term shewing that it does not mean malice, always signifies either *spite* against *a definite individual*[62] or the general desire to do injury to some one, which Austin styles malevolence[63]. This is the natural, *i.e.* the ordinary use of the word: and the legal use of a common word in a non-natural sense is, to say the least of it, undesirable.

The consequence of making malice in general terms a necessary element of crime is, says Sir James Stephen, that certain acts are declared to be *primâ facie wicked actions*, though circumstances may exist by which their wickedness is either removed or diminished[64]. In practice, this means a declaration that whosoever intentionally or knowingly

[59] G. V. 84, 85.

[60] *Nequiter, corrupto animo, de sua malitia, mala conscientia*, &c.

[61] Chapter v. pp. 61, 62.

[62] Which Austin, Lect. 12, p. 355, and 20, p. 446, holds to be its "original and proper meaning."

[63] *ib.*

[64] Stephen, G. V. 83.

produces certain results is criminally liable for them, unless he can prove one or other of the justifications and excuses recognized by law.

I do not quite understand the argument of the last-named author for retaining the word, "that new cases might arise in which it would be necessary to use it in its natural sense[65]." It would be apparently as easy to apply to a new case the principle of previously recognized justifications as of previously recognized malice. Moreover the '*natural*' sense of the word somewhat wavers between localized spite and general malevolence; while the legal sense has been held to be that purely negative one, which is perfectly satisfied by tabulating the recognized justifications and excuses.

But a far stronger argument, than any that I can allege, against the retention of this confused and confusing term, is its omission from our projected criminal code by the jurist and legislator whom I have just quoted. In murder, and mischief—the latter covering arson—the actual intention or other culpable frame of mind is set forth under its proper and intelligible name: in libel, the special design or, where that is not necessary, the nature of the matter published, are clearly expressed[66]. It seems perhaps a question whether common essentials or degrees of criminal liability, might not be rather more separated, as general preliminary matter, from the particular offences, than they are proposed to be in this Bill. But its great merits disarm criticism, especially from those who have not had practical experience in judicature or legislation: and not the least of those merits appears to be the extirpation of "*legal malice.*"

[65] *ib.*

[66] Code, § 227. Designed to insult...or *calculated* to injure the reputation. Should not calculated be *tending?*

CHAPTER VIII.

DEGREES OF CRIMINAL LIABILITY, CONTINUED.

A. *Major Criminality.*

Criminal Knowledge or Virtual Intention.

AUSTIN'S second subdivision of criminal knowledge—**criminal knowledge short of criminal design**—which was referred to in a previous chapter[1], is "where the production of the mischievous consequence which the law seeks to prevent is not the end, ultimate or mediate, of the criminal, but where he *knows* that such mischievous consequence (though he does not *wish* the production of it) will follow necessarily or probably his act or omission[2]."

Direct intention, in the ordinary sense of the word, will obviously be of the essence of many, if not most, crimes. These will, I think, be the cases where a *specific intention* really exists[3]. What we have now to consider are, such criminal consequences as may reasonably be believed *not* to have been *directly intended*, though there may have been "knowledge" that they would ensue. I believe, though it is

[1] Chapter VI. p. 79.

[2] Austin, Notes on Criminal Law, pp. 1093, 4. As here, and in the [bracketed] paragraph opposite, Austin speaks of *omission* being accompanied by criminal knowledge, I think he must use the former word in its loose and general sense of non-act. See above ch. III., and Austin, 20, p. 438.

[3] End of chapter VI.

hazardous to draw a hard and fast line, that this can only be the case where the *conduct* of the offender is of a *violent, mischievous*, or *dangerous* tendency[4].

I have spoken above[5] of that *capacity* to *expect the consequences of our conduct* which is *presumed*, as the result of ordinary experience.

It was there stated that the *guilt* or *liability* of the offender would vary materially in degree—the results produced being the same—as his state of mind turned out to have been *actual expectation* or the mere *capability* of it. Such an actual expectation, which is what I am now considering, will sometimes, conveniently for the purposes of justice, be *expressed, i.e.* evinced by words or clearly construable conduct of the offender. This might be called *express* criminal knowledge. More often, it has to be *inferred* from such conduct, and, in particular, from the character of what *was intended*. For the state of mind, now under consideration, must almost necessarily coexist with an intention proper, of consequences very nearly approaching to those that actually occur, so that the latter are as justly imputed to the agent as if he had directly intended them. For practical purposes this state of mind, including the case of *express criminal knowledge*, might be called **indirect** or **virtual intention.** The former phrase is Bentham's[6], and either is certainly preferable to our '*implied malice.*' The reasonableness of such an imputation as the above scarcely requires illustration.

[4] For instance, the example given by Austin of criminal knowledge, l. c. Arson of a house adjoining his (the criminal's) own, through his setting fire to his own with intent to defraud his insurers. The destruction of his neighbour's house will not subserve his end; but he knows that the destruction of his neighbour's house will follow, necessarily or probably, the firing of his own.

[5] Ch. IV.

[6] Austin, Lect. 24, p. 480. Bentham's own word appears to be "oblique." Introduction, ch. VIII. pp. 84, 86.

The man who lays a mine of dynamite, to destroy the Emperor of Russia at dinner, may have friends, amongst those at the party who actually perish, for whom he would lay down his own life: but, as to the imputability of their deaths to that man, there surely could be no hesitation.

Under this principle of virtual intention seem to come most of the murder cases where the malice required by law has received a free interpretation[7]. E.g. where an act not justifiable or excusable, and resulting in death, was done under circumstances shewing an intent to do serious injury to the individual[8]. Where the same result followed an act, in the abstract legal, but done with the intention of great bodily harm[9]. For an act, not unlawful in itself, may be performed in a manner so criminal and improper as to make the party performing it, and in the prosecution of his purpose causing the death of another, guilty of murder[10]. Such are the cases of cruel or unusual correction in *foro domestico,* laid by Blackstone[11] on *express malice;* where it must be remarked that if the instrument employed, though improper, was not *likely to kill* the offence was only manslaughter[12].

Again, there are rarer cases, where the intention is apparently not to injure any definite individual but to produce indiscriminate mischief—where, if death ensues, the English law speaks of *malice against all mankind* or *universal malice*[13]. It would seem here to depend upon the *degree of danger* in such acts whether their character is in itself sufficient to presume the 'evil design' which is technically required by English law, for *murder*, or only to constitute the minor

[7] See last chapter.

[8] See Fenton's case, 1 Lewin, 179. 1 Russell, 762.

[9] 1 East, P. C. c. 5, § 36. [10] Russell, i. pp. 767—780.

[11] Blackstone, Comm. 4. 14, p. 199.

[12] Foster, Disc. 2, p. 262. 1 East, P. C. c. 5, § 37. See Russell (i. p. 774) on R. v. Wiggs, 1 Leach, C. C. 379.

[13] Blackstone, Comm. 4. 14, pp. 192, 200. See too Foster, Disc. 2, p. 261.

liability of *manslaughter*. It is murder, though no stroke be struck by the agent and no killing may have been primarily intended, provided the *probable consequences* of the act done might be, as the actual consequences were, death[14].

In most of these cases there was obviously a definite intention to produce some *hurt or mischief*, akin and likely to lead to the actual result; and in the remainder what *was* intended, though not directly hurtful or mischievous, yet tended so probably to produce the actual result, that it *must* to a moral certainty have been contemplated and expected by the agent[15].

Criminal knowledge and intention both enter into the subject of *accessories before the fact*, now little distinguishable from those who actually commit a crime, although the only act of the accessory is an instigation. An *intention*, on the part of the accessory, is here expressed clearly enough. Mere knowledge, and conduct influenced by knowledge, that another intends to commit a crime, do not constitute an accessory before the fact, unless such conduct amount to active encouragement of the commission[16]. An accessory *after* the fact stands on a perfectly different footing: he wilfully or intentionally commits an independent criminal action[17].

To constitute a liability for *criminal knowledge* it is, I think, essential that the injurious results must have *actually happened*. That is, punishability for *attempts* or inchoate acts[18] can scarcely be extended by the consideration of any other results than those which were *directly intended*. Where, however, the result *has* happened, and the circumstances clearly shew that it *must* have been *contemplated* and

[14] Blackstone, 4. 197.

[15] See the cases of "wanton indifference to life," suggested by Sir James Stephen, G. V. p. 118.

[16] Stephen, Digest, Artt. 39—44.

[17] *ib.* Art. 45.

[18] Above, chapter II.

expected by the offender, common sense and common practice agree in regarding the question as utterly immaterial whether it was also *desired* by him or no.

We may therefore go so far with Austin as to class criminal knowledge *with intention*, or even to call it *virtual* intention. To apply the word intention, without a qualifying adjective, to *both*, is an unnecessary running counter to the ordinary meaning of words, and moreover tends to obscure the fact that there *is* another mental condition, of equal criminal liability, with intention *direct* or *proper*.

CHAPTER IX.

DEGREES OF CRIMINAL LIABILITY, CONTINUED.

B. *Minor Criminality.*

Inadvertence.

In the major degree of criminality, which I have called **virtual intention,** it is assumed that an adequate *application* of the ordinary standard experience has taken place to enable the agent to form a *true expectation.* In the minor degrees remaining to be considered, that application is understood to be either wanting or inadequate: *i.e.* there is more or less **inadvertence** on the part of the offender.

The three states of mind considered by Austin, under this head are **Rashness, Heedlessness,** and **Negligence.** The distinction between the first two may appear at first sight over refined; but I believe it is a real and useful one. The third, if the term *negligence* be used in its proper sense, is confined to non-act.

In **rashness,** then, the party *adverts* to the probable mischief; but, from insufficient advertence, assumes that it will not ensue[1]. His missupposition must be absolutely confident and sincere, or he has *intention* according to Austin[2]—*virtual intention,* according to the phrase adopted here—of the consequences. Rashness therefore borders very nearly on *criminal knowledge* or *virtual intention.* This is the

[1] Austin, Lect. 20, pp. 440, 441.

[2] *ib.* 442, 444 (hasty intention).

meaning attached by Austin to the phrase *Negligentia dolo comparatur*[3]. Both the experience and the advertence of that experience are *ex hypothesi* present, but are counterbalanced or overcome by false reasoning.

In **heedlessness** the application or advertence of the same experience is supposed to be entirely wanting. The heedless man *does not think* of the probable mischief; he does an act[4], from which he was bound to forbear, because he *adverts not* to certain of its probable consequences[5].

In this last quoted passage, as elsewhere, Austin looks to the *agent's* end of the chain, and the original obligation upon *him*, first. Perhaps the more natural point of view is that which regards the *acts* themselves as "dangerous" ones[6], and the agent as *primâ facie* liable for the natural consequences of his acts, to the full extent, unless he can prove such partial or total inadvertence as, under civilized governments, generally renders those consequences imputable to him only in a less degree. The *mistaken surmise* or assumption, in *rashness*, will be sometimes easier to prove than the *negative* required in *heedlessness*, and may also involve a minor criminality, since the offender had some reason, though a bad one, for not expecting the actual consequences.

For instance, the driver of an express, being instructed always to wait for the signal that a certain goods train has passed over a small portion of his line—which goods train is

[3] *ib.* 443. I would rather translate it "is (in some cases) *put on a par* with *dolus*." The reasoning probably applies only to civil cases.

[4] This of course distinguishes him from the *negligent* man who *does not* do an act. Austin, pp. 440, 441.

[5] *ib.*

[6] See the beginning of the last chapter. I suppose that most possible cases will come, either directly or remotely, under the expression "dangerous *to human life*," which is that employed by Stephen, Digest, Art. 216. Code, § 162. It would, perhaps, be hypercriticism to suggest the insertion of the word "human" in the *heading* to Digest, ch. 22, and Code, Part 15.

generally *ten* minutes late in coming on his line—arrives at the point of junction *five* minutes after the goods train is due. There is no signal, and his stoker warns him to pull up: he says, the goods train cannot have got on the line yet, goes on, and runs into it. His liability would probably be held to be less than if he had merely not thought about the signal at all.

Last comes **negligence,** defined by Austin to be the not doing an act which you are bound to do, because you do not advert to it[7]. The state of mind is identical with that in *heedlessness:* the difference is the difference between *forbearance* and *act.* Negligence and heedlessness are, in fact, forbearance and act, *minus* the *advertence.*

There are, obviously, criminal cases of pure negligence, where there is no *action,* no *forbearance,* and no *intention,* either in Austin's sense or the general one[8]. As when a pointsman, from pure carelessness—say, chattering with a friend—omits to set his points right, and a train runs off the line in consequence. Or, when a parent, husband, or master simply neglects to supply those dependent upon him with necessaries, and thereby causes death or bodily injury[9]. Of course the slightest evidence of *purpose,* or even perhaps such "grossness" of negligence as would necessitate a belief that some grievous injury must have been contemplated, takes the case out of the present category[10].

[7] Austin, Lect. 20, p. 440.

[8] Is it not therefore by an oversight that Sir James Stephen lays it down that *Intention* is in every case essential to crime because it is essential to *action* (see above, p. 75), *and every crime is an action* (G. V. p. 81)? In Digest, Art. 211, he shews it to be law that neglect of certain duties *ranks as an act.*

[9] For liability from mere omission see Park, J., in R. v. Green, 7 Carrington and Payne, 157; overruled by Campbell, C. J., in Hughes' case, Dearsley and Bell 250, and R. v. Lowe, 3 Carrington and Kirwan, 123 (1 Russell, p. 834, note *n*).

[10] Stephen, *ib.* note 1. See Pattison, J., in R. v. Marriott, 8 Carrington

Negligence, however, is, in practice, more often combined with a *positive* act. Something is done, not in itself unlawful, but the necessary precautions are not taken in doing it; so that negligence is here difficult to separate from rashness or heedlessness. The nature of the act, and the manner in which it was done, will generally enable us to distinguish between this negligence and the criminal knowledge spoken of on p. 98. Railway accidents are unfortunately a very common instance at the present day[11].

Professional negligence or incompetence. There is a particular class of cases where the inadvertence is not so much immediately connected with the conduct as, in Austin's language, "remote." This principle is applied by him *inter alia* to *drunkenness*[12], but is more suitable to *imperitia* or *want of professional skill*[13], which, if we take the whole history of such cases into account, seems rather to belong to the head of *rashness* than of *negligence*.

Extreme cases of *mischance*, which ordinary professional skill could not have anticipated[14], or of *gross and improper rashness* which ordinary professional skill would have prevented[15]; do not present much difficulty. In the former there is no criminal liability at all, in the latter there may be

and Payne, 433, and 1 Russell, p. 661, note *f*. Also the remarks of Denman, C. J., on "wilful mischief and gross negligence" in Lynch v. Nurdin, 1 Adolphus and Ellis, p. 38. A distinction between the use of "methods which would probably end in death,"—rendering the prisoner guilty of murder—and such "wicked negligence" as only rendered her guilty of manslaughter, is rather finely drawn by Brett, J., in R. v. Handley, 13 Cox, 81.

[11] See Russell, I. 831—839.

[12] Austin, Lect. 26, pp. 512, 513.

[13] *ib.* 513.

[14] As Lord Hale says (1 P. C. 430)—"God forbid that any mischance of this kind should make a person guilty of murder or manslaughter." R. v. van Butchell, 3 Carrington and Payne, 634.

[15] Gross and improper rashness and want of caution may make an application felonious. Per Bayley, B., 4 Carrington and Payne, 440. See too p. 405.

the highest degree: *a fortiori*, if there is any conscious contemplation of the consequences shewn[16]. Short of this, death arising from ill treatment by a medical practitioner (which is the case where the present point mainly arises) may render him liable in the minor degree of *manslaughter*.

The *positive duty* of a medical practitioner is laid down by Bolland, B., to be this: "He is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention and assiduity[17]." The tendency of our law is perhaps rather to hold a man liable *in damages* than criminally[18] for want of the competent skill; and it was apparently held[19] that to substantiate a charge of manslaughter against a medical man, he must have been guilty of gross negligence after applying a remedy, or of gross rashness in applying it. But, on the whole, it would seem that mere ignorance may make a practitioner criminally liable if a jury regard it as culpable under all the circumstances of the case[20].

The mere fact of a practitioner not being "*properly qualified*" is not enough to attach criminal liability where there is no proveable want of care or skill[21]. The advantage of a recognized diploma or certificate doubtless is that a jury would naturally consider it strong *primâ facie* evidence of sufficient skill.

In Roman law *want of skill*, or *neglect*, in a medical man, were either of them sufficient ground for civil pro-

[16] See above, note 10.

[17] R. v. Spiller, 5 Carrington and Payne, 333.

[18] R. v. van Butchell, 3 Carrington and Payne, 634.

[19] Bayley, B., in R. v. Long, 4 Carrington and Payne, 440.

[20] Stephen, Digest. Art. 211, Ill. 5. See also p. 436 of the case last cited.

[21] See Hale, as cited above (note 14); Blackstone, 4. 14, p. 197; also 3 Carrington and Payne, 629; and 4. 398, 423.

ceedings[22]. Of criminal liability in such cases we hear nothing.

The same holds where a judex was said *litem suam facere* by a wrong decision[23]. In fact, the treatment of this case is based upon the fact that the loss is the same *to the party*, whether it happen from the corruptness or incapacity of the judge[24]; the liability, however, may be transferred to the latter's legal adviser or *assessor*[25].

I only mention the last subject, which is coupled by Austin with *imperitia medici*[26], as an instance where "the guilt of a party" (here, in Roman law, only his *civil* liability) "consists in taking upon himself the exercise of a function, without duly qualifying himself by previous preparation[27]. Such conduct is, in its origin, rather *rashness* than negligence; and it might perhaps be better to couple the present faults of the professional man with their ultimate cause, under Austin's very apt title "remote inadvertence." But it is difficult to see any such serious objection as is made by a very able writer on jurisprudence, against the recent judicial use of the word *negligence*, to indicate, as a state of mind of the person whose act or omission is under consideration, absence of the care of a skilled workman[28].

[22] Dig. 9. 2. 7. 8. Si medicus servum imperite secuerit. 9. 2. 8. 1. Et qui bene secuerit et dereliquit curationem. See too Just. Instt. 4. 3. 6—8.

[23] Just. Instt. 4. 5. pr. from Gaius' Aureorum, Dig. 44. 7. 5. 4.

[24] Dig. 21. 2. 51. pr. Quid refert, sordibus judicis an stultitia res perierit?

[25] Dig. 2. 2. 2. Si assessoris imperitia jus aliter dictum sit quam oportuit, non debet hoc magistratui officere sed ipsi assessori.

[26] Austin, 26, p. 514. The illogical distinction of obligations *ex delicto* and *quasi ex delicto* (*quasi-delicts* is an inaccurate term) is rightly explained by Ortolan Instituts, § 1781, on Just. Instt. 4. 5. pr.

[27] Austin, *ib.*

[28] Markby, §§ 220, 221, pp. 108, 9. The particular decisions were on *action* for negligence; but, as to the question whether negligence can in such cases be said to designate a state of mind of the party, the reasoning would be precisely the same in *criminal* cases.

That this professional negligence may lead to both rashness[29] and heedlessness, as well as to negligence proper, is perfectly true. Also that to define negligence merely as omission of what the law requires is to tell us nothing[30]. But the law *does* require something definite in these cases, viz. the care of a skilled workman.

Duties the breach of which constitutes criminal negligence. It has been stated above that there is no criminal liability attaching even to the most intentional forbearance, unless the act forborne was one which the party was *under a legal obligation to perform*[31]. This principle obviously applies *a fortiori* to *negligence* proper, *i.e.* the inadvertently not doing an act which we *are bound to do*, and to those combinations, of negligence proper with *rashness* or *heedlessness*, which have been indicated under the names of remote inadvertence or *professional negligence*.

It now remains to be seen whether the word *professional* in this last phrase ought not to be somewhat qualified, and the distinction to which it points, placed upon a clearer and better basis.

A Lady Bountiful, for instance, who chose to distribute poisons amongst her pensioners, might be, and the most grossly incompetent attorney would not be, liable, as such, to criminal proceedings. The proper distinction is indicated in a positive statement, by Sir James Stephen, of "*duties tending to the preservation of life*" *as connected with* (and therefore in their infringement constituting) "*culpable* (*i.e.* criminal) *negligence*[32]." Part of these duties are incumbent upon heads of families, or others in charge of those unable to provide themselves with the necessaries of life[33]. Part,

[29] *ib.* § 222, p. 110.

[30] *ib.* § 223, p. 110.

[31] Ch. III. *ad finem.*

[32] Stephen, Digest, ch. 22. Code, Pt. 15.

[33] *ib.* Arts. 213—5, §§ 159—161. See also Code, §§ 223—226 (Pt. 22), (corresponding to Digest, Arts. 264—266), which might apparently come in Part 15.

and those most clearly stating the principle in point, are incumbent upon all persons having or undertaking *any charge where either act or omission may endanger human life*[34]. Here the employment of reasonable knowledge and skill, of reasonable precautions and care, is made a *legal duty;* and the corresponding *negligence*, whether coupled with *positive acts* or not, a *criminal offence*[35].

Neglect in *respect of public offices*, and neglect *to assist in the preservation of public order*, are exceptional cases which, however, do not present any difficulty[36].

Bentham[37] would extend the application of criminal sanctions to the "refusal or omission of a service of humanity when it would be easy to render it, and some distinct ill results from the refusal." He certainly gives some very strong instances of forbearance or omission[38]. How far it is advisable to transfer the "rules of beneficence" from the domain of morals to that of legislation is doubtful. But such a transfer is at any rate, as yet, rather matter for the reformer and politician than the jurist or practical lawyer.

[34] For the present law, Stephen, Digest, Arts. 216, 217. Several important points are added or more clearly stated in Code, §§ 162—4.

[35] In both classes of cases it would seem that a positive legal duty must be alleged in the indictment. See R. v. Edwards, 8 Carrington and Payne, 612, and R. v. Barrett, 2 Carrington and Kirwan, 345. I do not see that *this* point is overruled in Hughes' case (Dearsley and Bell, 250) as Russell seems (I. 833, note *k*) to intimate; though perhaps, in the case of what may be called a *natural* duty, it might be sufficiently expressed by a mere statement of the relation of the parties.

[36] Stephen, Digest, Arts. 122, 123; Code, §§ 117, 118.

[37] Introduction, p. 323. Principles, Dumont, tr. p. 65.

[38] Note to Int. p. 323. There could not be a very much stronger instance than the conduct of certain bargemen, as stated in a letter to the *Times* (July 23, 1880), while these sheets were in preparation for the press.

CHAPTER X.

GENERAL REMARKS.

THE principles, which I have endeavoured to make out in the preceding chapters, are as I conceive, axioms or preliminary matter to criminal law in general, which are admitted by the practice of most civilized countries.

There must be an injurious event reasonably connected with the conduct of some human being and not justified or excused by law; otherwise there is no offence and no offender.

The offender must have been "able to help" his conduct; able to foresee the consequences of that conduct; able to know that that conduct was *wrong:* otherwise he will be, generally speaking, totally exempt from criminal liability.

Of his criminal liability, again, there may clearly be two degrees: a *major* degree, when he either directly *intended* the criminal consequences or *must* have *expected* them to result: a minor degree, when he probably *did not* expect, but *might have* expected, the same consequences to result.

In this minor degree of liability, resulting from *inadvertence,* there will be various classes of cases; as the conduct is *positive* or *negative* or both combined, the inadvertence *present* or *remote,* the state of things more or less likely to have suggested the actual result: but I do not think any general rule as to the relative amount of criminality can be laid down between them.

Axioms such as these are, like the geometrical axioms, no *a priori* assumptions, but rules found necessary in actual

experience: they are, in fact, generalizations from judicial observation. A time may, it is hoped, be coming, when such legal rules may be brought into a form as exhaustive as we believe their mathematical congeners to be; and when criminal law generally will receive little, if any, addition from later cases, because a new point can scarcely arise.

Such is the hopeful view which has led Sir James Stephen to regard the English criminal law as now ripe for codification, and, in particular, to prepare that admirable Digest which has rendered codification actually possible[1]. Yet, however near we are to the day, which so many generations of law-reformers have desired to see—and have not seen—there may be some little doubt whether the *generalia* or preliminary matter, considered in this work, can be quite satisfactorily concluded within the limits of an ordinary English statute. It is not that they are rather matter for courts than for private individuals—that is true of all modern law. It is rather that they must require, however well-drawn, continual illustration by both actual and hypothetical cases. This *desideratum* is very clearly expressed by Sir James Stephen himself, where he speaks of the possibility of giving a *literary* form to Acts of Parliament[2].

In the Indian Evidence Act, drawn by the same author, such a system of illustration was adopted: but it is questionable whether this form of statute would be likely to be passed by a British Parliament. In order, therefore, to attain the highest practicable utility, such a work as the Digest, if it could not, as it probably could not, be enacted *en bloc*, ought to accompany the statute, which does enact its substantive provisions, on as nearly equal a footing as possible. This reasoning applies, more or less, to the whole of a code; but I think most strongly to its general and preliminary matter.

When, therefore, our criminal code finally emerges from

[1] Digest, Int. xiv. xv. [2] *ib.* xx.

the crucible—perhaps one should rather say the battle-field —of Parliament, its surviving clauses might be furnished with a most valuable comment, in a rearrangement of the contents of the Digest, under those clauses. If recognized by our tribunals as a fair statement of "common law" old and new, such a comment *would* have practically the same authority as the text. It would also afford a rationally arranged receptacle for such additions as future cases might necessitate. The evil of unnecessary reporting[3] must continue to some extent, unless the judges could find time to select, very shortly after decision, those cases which appeared to them to contain anything worth record, and to throw aside the rest. But it would be possible for yearly compilers, whether official or not, to reduce and generalize, under intelligible divisions, the matter which has not always met with such treatment hitherto in our reports and text-books.

[3] *ib.* xv.

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